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HEARING OF THE SUPREME COURT ADVISORY COMMITTEE

MARCH 19, 1994

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Taken before William F. Wolfe, Certified Shorthand Reporter and Notary Public in Travis County for the State of Texas, on the 19th day of March, A.D. 1994, between the hours of 8:30 o'clock a.m. and 12:35 o'clock p.m., at the Texas Law Center, 1313 Colorado, Austin, Texas 78701.

SUPREME COURT ADVISORY COMMITTEE

MARCH 19, 1994

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MARCH 19, 1994 MEETING

MEMBERS PRESENT:

Prof. Alexandra W. Albright
Pamela Stanton Baron
Professor Elaine Carlson
Sarah B. Duncan
Honorable Clarence A. Guittard
Michael A. Hatchell
Charles F. Herring Jr.
David E. Keltner
Joseph Latting
Gilbert I. Low
John Marks
Honorable F. Scott McCown
Russell H. McMains
Harriet E. Miers
Richard R. Orsinger
Luther H. Soules III
Stephen D. Susman
Stephen Yelenosky

MEMBERS ABSENT:

Alejandro Acosta, Jr.
Charles L. Babcock
David J. Beck
Honorable Scott A. Brister
Honorable Ann T. Cochran
Professor William V. Dorsaneo
Michael T. Gallagher
Anne L. Gardner
Donald M. Hunt
Tommy Jacks
Franklin Jones, Jr.
Thomas S. Leatherbury
Robert E. Meadows
Honorable David Peeples
David L. Perry
Anthony J. Sadberry
Paula Sweeney

EX OFFICIO MEMBERS:

Justice Nathan L. Hecht
David B. Jackson

Honorable Sam Houston Clinton
Paul N. Gold
Doris Lange
Thomas C. Riney
Honorable Paul Heath Till
Bonnie Wolbrueck

OTHERS PRESENT:

Lee Parsley, Supreme Court Staff Attorney

CHAIRMAN SOULES: We'll come to order. Anyone who was here yesterday that didn't sign our list please be sure to do that sometime today, sign yesterday's list. I'll put it here. And a new list is coming around for today's attendance.

I think the sanctions report is going to be somewhat abbreviated today, and we probably will wrap that up in the next session, is what we'd like to do, at least on the Rules we spent so much time on.

Joe, what do you have on that?

MR. LATTING: Well, I wrote everyone and I suppose everybody has gotten a copy of this. I sent it out Monday.

CHAIRMAN SOULES: Incidentally, check to see that your name tag is in front of your seat there because we have a new court reporter who is not familiar with everybody's names yet.

Excuse me, Joe, go ahead.

MR. LATTING: Well, I'm referring to my letter of March 14th. It's very brief. Let me just go over it.

It says that the only thing that we have

to propose this morning is a comment to Rule 166, which is really the work of Pam taken from the ABA, and it addresses the issue of what kind of a hearing should be held, not what the powers of the Court are so much, but what kind of a hearing should be held and what the Court may consider.

We say here that due process requires that before sanctions are imposed the alleged offender be afforded fair notice and an opportunity to be heard. The procedure employed may vary with the circumstances provided that due process requirements are satisfied.

The Court in its discretion shall determine whether to hold a hearing on the sanctions under consideration as well as the type of evidence considered.

And then we say, "See the Rule on Hearings Task Force on revisions of the Texas Rule of Civil Procedure."

We have to wait to hear from them before we know how to refer to that properly.

Then we go on to say, "A hearing is ordinarily required prior to the issuance of

any sanction that is based on a finding of bad faith on the part of the alleged offender. A hearing is appropriate whenever it would assist the Court in its consideration of the sanctions issue or would significantly assist the alleged offender in the presentation of his or her defense.

"None of the subcommittee members is entirely happy with this language, but we do not feel it's a good idea to go further in drafting a comment at this time for two reasons:"

And then I won't read my letter, but what we say here in essence is that we haven't heard yet from Tommy Jacks, who is going to draft for us the prevailing version of the sanctions motion that we have debated for a long time in here, and I won't go over that again, but Tommy is the one who is going to -- who has undertaken to draft that, and he is unable to be here today and has not been able to do it so far. It's really difficult to go forward any more until we get that exact language.

Then we also say that we think that this comment is such an important -- or this issue

is so important that it ought really be left maybe to Bill Dorsaneo's group to talk about what judges may consider at pretrial hearings.

And the issue that's out there floating around there is this: A lawyer stands up and says, "Judge, here is what happened." This happens all the time. I'm looking at Judge McCown. You know this happens. You get to court, two lawyers stands up, one says, "Here is what happened, Judge. A, B, C, D."

And the other one says, "No, that's not what happened. What happened was such and such."

Well, can the Court enter an order based on that kind of representation? It's no evidence at all, but my experience is that it happens all the time. Should we even address that in this Committee? If an unsworn assertion is made by an attorney in an pretrial hearing, should the other side have the right to cross-examination that attorney? Those are pretty important issues. I guess they are. And that's right at the heart of what we're doing.

The Sanctions Committee feels like that we

have the cart in front of the horse and that we ought not talk about this any more at this time, not because we're trying to prolong it or dodge it; I think we should not duck it. I think we should address this issue very squarely, but until we see what discovery direction we're taking and until we see what Jacks is going to propose by way of actual language, we really can't do anything further except to suggest this rather innocuous ABA language.

So that's what we've done. That's where we are today.

MR. HERRING: And I think you might add that we probably don't even want to vote on this language today because, as we talked about last time, Bill Dorsaneo is coming up with a general rule to talk about hearings and what courts may consider or may not consider, and we would kind of like to see that before we have a comment that takes that into account.

CHAIRMAN SOULES: Okay. We had a vote of 13 to 10 last time to redraft the Sanctions Rule along the lines that Tommy Jacks

suggested. He has not participated in the interim.

Does anyone in the 13 want to take a crack at that? Because next time we're going to go to a vote, a final vote on sanctions whether we have input or not from the 13. So who wants to take that on? Shelby?

MR. SHARPE: I don't want to take that on, but I want to give you a report.

The State Bar's Committee on Court Rules will take a final vote on a complete rewrite of Rule 13 which is totally consistent with what you did on Jacks' vote and what was the vote back in November of this Committee. I think you will have that, Joe. The meeting is the first Saturday in April. You will have that meeting before we meet next. You will see the complete rewrite. It's coming from Bill Jones' subcommittee on sanctions. There's also a complete rewrite of Rule 215 with a new number.

And by the way, what Bill Dorsaneo by and large is using is what's coming out of Court Rules because he also sits on that state bar committee. So this Committee, when it meets

next in May, the subcommitte and the task force will see from Court Rules its rewrite of Rule 13 which -- I can tell you right now it completely passes muster on the hearings, the procedures, the whole bit.

Also, Rule 13 will not apply at all to discovery. It will apply to everything but discovery. In fact, it will even have a disclaimer that it does not apply to discovery. And then the Rule that's coming up will have basically the two-tier approach that you asked for, which basically is motions to compel, except in those circumstances where it's just not practical, and then the sanctions. And then it sets up all the procedure and the process and it's very concise.

I have seen their advance product, which in fact it almost passed at this last meeting but we just didn't have a chance to get the wording exactly as Court Rules wanted, so your Committee will have that. This Committee should be able to act with some type of final approval on 13 and whatever the number is going to be on whatever relates to discovery.

MR. LATTING: Could you send me --

CHAIRMAN SOULES: When will you have that to Joe?

MR. SHARPE: Our meeting is, I think, April the 9th, whatever that Saturday is, and he should have it by the 12th or the 13th of April. And we don't meet until May.

MR. LATTING: Would you mail it to me directly?

MR. SHARPE: Oh, it will come direct to you. It will go directly to you.

MR. LATTING: Okay.

CHAIRMAN SOULES: What I would like for you to do is to go ahead and send us a draft.

MR. SHARPE: Sure.

CHAIRMAN SOULES: Whatever the status of that is right now, send it to us. Send it Joe so he can start thinking about it. And tell the Court Rules Committee that this Committee is going to act, probably take final action on sanctions at the May meeting, and if they're not on the train, it's leaving.

MR. SHARPE: Yeah. We knew

that. That's the reason why we scheduled that April meeting.

CHAIRMAN SOULES: Okay. But we do have -- the Supreme Court wants work product out of this Committee in its hand and we haven't done it. In three meetings we haven't sent anything and we're not going to get anything to it as we go through this meeting. This is the third meeting, of course. The next meeting we have to get something to the Supreme Court.

MR. SHARPE: Well, these Rules have been in the process through this subcommittee for two years of work on 215 and three years on 13 and I really think they have it down in good form.

CHAIRMAN SOULES: Okay. That's fine. Well, there has been some sensitivity in the past on that State Bar Committee that this Committee wasn't receiving its work product, but that's never been the case. It's just that this Committee has got work to do and we want the input from that committee.

Every request that I get from anyplace goes to your staff, the State Bar staff of the

Court Rules Committee, so you're -- they had this agenda before it was ever distributed to our membership as it came from time to time, and we do want input on everything, but we've got to, of course, keep our docket too.

Pardon me, go ahead, Joe.

MR. LATTING: Two things. I think that if somebody besides Tommy is going to be responsible for writing this Rule that on our Committee it should be Pam. I volunteer Pam to do it. She's articulate.

MS. BARON: Thank you so much.

CHAIRMAN SOULES: Okay.

MR. LATTING: And the other thing is I want to respectfully -- this is not personal at all -- I want to say that I hear what you're saying and that the train is leaving. I personally feel that the train ought not to leave on sanctions until we decide what we're going to do with discovery.

And for Dorsaneo, I think we're writing the Rule that we ought to write last first, because until we see those other Rules, we're trying to make this -- we're doing the pathology before we've done the anatomy.

CHAIRMAN SOULES: Well, the Chair is doing the best I possibly can to advance the ball.

MR. LATTING: I understand.

CHAIRMAN SOULES: And discovery has been later than sanctions in developing and we've got to keep rolling.

MR. LATTING: We're going to do it.

CHAIRMAN SOULES: Okay. We're going to do it.

MR. SHARPE: One final comment, Mr. Chairman. For Joe's comfort level, Bill, of course, has been a member of the State Bar Committee on Court Rules for as long as he has probably been on this Committee, and he is familiar with where he is going on the discovery aspects of it, which are also consistent with what he's been working with on Carl Hamilton's subcommittee on discovery there, so I think you're going to find that this Sanction Rule fits in with what Dorsaneo and the others have been doing on discovery. It is not incompatible with what's coming out of Steve Susman's committee in principle, so

it's going to fit.

MR. LATTING: Okay. Well, I'm glad to hear that. I just didn't know either one of those things.

MR. SHARPE: Correct. No, it will fit.

CHAIRMAN SOULES: Okay. We spent a lot of time on 166d, very little time, if any, on 13 in sessions here, and then there are some other Rules that the Sanctions Task Force felt needed some adjustment. And I want to go through all that next time and at least get 13 and 166d done. The rest of it may have to wait for final action until all the other Discovery Rules.

If anything else can be accomplished without going to the rest of the Discovery Rules, let's get that out of the way, too, so we can get the sanctions subcommittee wrapped up, except as we may need to make adjustments much later in the year whenever discovery is completed, and then we'll have to look to see how they work one set of Rules with the other, the Sanctions Rules with the Discovery Rules.

Anything else on sanctions today? All

right. Who is going to be the draftsman for yours? Is it going to be Pam Baron?

MS. BARON: Only reluctantly.

CHAIRMAN SOULES: Pardon me?

MS. BARON: Only reluctantly.

CHAIRMAN SOULES: Only reluctantly.

MR. LATTING: That's a yes.

CHAIRMAN SOULES: Okay. Well, somebody in the 13 who wants to carry the ball needs to get involved, because otherwise we're not going to get the changes made.

MR. HERRING: Well, Pam needs to talk to Tommy. That's what needs to be done.

MS. BARON: And I'll do that.

CHAIRMAN SOULES: That's right. But if that doesn't work out, then we've still got to wrap it up next time.

MR. LATTING: We'll have a draft here for next time.

CHAIRMAN SOULES: Okay. And I think that brings us to discovery. And Steve, you've got a report that says "Working Draft 3/14." Is that the current -- is that what we should be looking at?

MR. SUSMAN: That's it.

CHAIRMAN SOULES: Okay. It looks like this (indicating)?

MR. SUSMAN: Correct.

CHAIRMAN SOULES: You mailed this to the members, did you not, Steve?

MR. SUSMAN: It was mailed on Monday to all the members.

MR. ORSINGER: I have one extra copy if anybody wants it.

CHAIRMAN SOULES: Do you have a copy, Judge?

MR. ORSINGER: Sorry, it's gone.

CHAIRMAN SOULES: Somebody may have to look on with somebody.

Now, let's see, Shelby, is this the paper that you said -- request for new Rule or change of existing Rules and so forth, 166d? Is this it (indicating)?

MR. SHARPE: That's the medical mal.

CHAIRMAN SOULES: This is the medical mal?

MR. SHARPE: Correct. Unless

your secretary distributed that, that's not in their packets.

CHAIRMAN SOULES: Okay.

MR. SHARPE: It went to you for distribution, so you'll have to look at that in the next meeting.

CHAIRMAN SOULES: Okay. Is this for Court Rules?

MR. SHARPE: Yes. That was done at the request of Chief Justice. We faxed him a draft to see if we were on line with what he had in mind, and he confirmed that he had finalized that at the last meeting.

CHAIRMAN SOULES: Okay. Steve, are you ready to go?

MR. SUSMAN: Ready.

CHAIRMAN SOULES: Okay. Please take the floor.

MR. SUSMAN: And I've moved over here because some say it's easier to hear than in the middle and I've got some stuff on the chart here to use to demonstrate kind of what our theme is.

The discovery committee has now held a number of meetings in Austin, the subcommittee,

and a number of phone conversations. And we decided, as we began our work, to begin with discussing the discovery vehicles and the limitations on them rather than go to the more general subjects of the scope of discovery and whether it should be voluntary disclosure or "I don't give it to you until you ask for it" or the role of the Court in pretrial conferences or the need to supplement discovery answers, all of which are subjects that we will come to, but they seem to have been subjects that have been thought a lot about by the Discovery Task Force; and whereas we thought this issue of limitations was something we could get into real quickly, come up with some very concrete proposals and it would also be an area in which we could make a lot of changes.

You basically have before you our idea of interrogatories, experts, depositions and the general discovery timetable. Coming to you before the next meeting, we have it drafted but we have not finally -- did not get it to you in time, is a recommendation on the request for production of documents, Rule 167.

The basic theme or the general philosophy

of the subcommittee is subject to your -- really what we want to know is are we going in the right direction, because if this group doesn't think we're going in the right direction we need to make a lot of changes.

Our general notion was that we cannot count on the micromanagement by courts through the pretrial conference device or the good will of counsel through a Gandhi-type cooperation to solve the problem that we have in the courts today, that the civil litigants have in the courts today. It's just too damn expensive. It takes too long and it's too expensive and no one can afford to have a dispute resolved the traditional old-fashioned way.

You've got to go to mediation because you cannot afford to go to a trial, and so the feeling was that it would be nice if Courts could do it for us, but in a state where we have an elected judiciary, it is unlikely that the Courts are going to be willing on their own motion to put the kind of limitations that lawyers ought to have put on themselves. And in every case we have been in, mostly one lawyer -- it's rare that two lawyers will

agree on the way things ought to operate. It happens periodically but not often.

So we began with the general idea of imposing a discovery limit, a window of time during which discovery can take place. And that, as you can see what we have done -- and by the way, as you see -- as you go through these Rules, you will see that the Rule 166c and all these numbers are kind of all mixed up because we'll have to get them straight and fixed up. But what we wanted to do and have right at the front is the notion that everything that we do on these Rules can be modified by agreement of counsel or by order of the Court on a motion made for good cause shown, so it's all subject to change.

Everything is subject to change, but the burden is upon the one who wants to change these limits to come in and show some good cause, or the Court can do it on its own motion or the parties can certainly agree, but our notion generally is that regardless of when the case is filed and regardless of when the case is set for trial, six months is enough time in any case for the parties to complete discovery

if they work at it.

There is a tremendous -- one of the biggest expenses in civil litigation today is the starts and stops. You pick up a file, you ask questions, you ask to take a deposition. Two months later you come back for a summary judgment hearing. Three months later you come back for another deposition. There are too many starts and stops.

I mean, the ideal solution, you know, in the ideal world would be lawyers would work on one case at a time. Well, we felt that's a little too radical. Probably we can't do that right now. But we didn't think there was anything unreasonable about the six-month window, particularly when there was some ability for the lawyers among themselves to agree when the window begins, when the discovery period begins.

We said the discovery period should begin at the time the first deposition is taken in the case or at the time that the first document is produced in response to a request for production of documents, some kind of objective event that says that's when the six months

begins. And then to some extent the lawyers have control over when they want it to begin by when they take the first deposition. And I'm sure if we were in a case together, we might discuss when are we going to kick things off and how are we going to kick things off.

And then that discovery window runs for a period of six months and then ends, and it ends regardless of when the case is set for trial. The case might be set three years hence. It has nothing to do with the trial setting.

We've got to get people thinking that discovery and trial are two different things. That was the feeling of our subcommittee because, you know, you get in these cases where people say, "What's the harm of continuing discovery until the trial?" Well, the harm is that it costs a lot of money, and it seems to me that that's something that we have to do something about here. It's something that we can do to save the public money and be very proud of.

Anyway, that was the notion of the discovery period being six months, and that's basically what we had in Rule 166b, which

probably ought to be transcribed as Rule -- I mean, we ought to begin with a modification probably.

Before we go into detail, I want to just kind of take you through these Rules and explain them to you generally and then we'll come back and discuss them in greater detail.

There is Rule 166(c)(3) at the bottom of the first page where we have tried to determine what a side is, because certain limits are placed on each side in a deposition. This could be a problem, we realized. For each side in a trial this could be a problem, and we've tried to do that in Subdivision 3 by saying that should be determined by the Court pursuant to the provisions of Rule 233.

The Interrogatory Rule, we have basically set a limit on the number of interrogatories, including subparts, at 30, but no limitation on the number of sets. If a lawyer wishes to ask six sets or 30 sets, one interrogatory per set, he should be allowed to do so. Also we have intentionally said that there shall be no limit on the number of interrogatories which can be asked to simply ask another party to identify

documents or authenticate documents, and that's in Rule 168a.

In 168b, we basically take the position and there was some argument as to whether the answers to interrogatories should be verified by the client or the lawyer. We know that they're written by the lawyer frequently. We opted for saying that the client should still have to sign and verify the interrogatories in spite of the fact that the lawyer usually writes them. On objections we say you can by -- and that includes answers to contention interrogatories. Objections, of course, would be signed by the attorney making them.

We thought that one of the biggest abuses of interrogatories today was the use of an interrogatory to require the other side to marshal its evidence. "Tell me every fact, please state every fact and identify every document and witness that supports the allegation on Page 8 of your petition." We thought that's an abuse of the interrogatory vehicle.

Yes, interrogatories need -- you need to preserve the use of an interrogatory to

determine whether the person is contending this as a tort or a contract. Yes, you ought to be able to use interrogatories to determine the contentions of the other party, and that's a far preferable way, depending on what his contentions are, than some summary motion or some special exception hearing which requires a lot of court time.

But contention interrogatories should not go so far as to require a person to marshal their evidence, and we tried to deal with that on Page 4, little "d," in the middle of the page, on contention interrogatories, where we say that a party can use contention interrogatories only to request another party to generally state the facts and specifically state the legal theories upon which that party bases their particular allegations and to request another party to admit or deny specific facts. That wording, we hoped, together with the comment on the following page will put an end to the use of interrogatories as a vehicle for requesting the other party to marshal facts.

We retained the option to produce

documents in lieu of answering the interrogatories, but make it clear that the person who refers -- in a response to an interrogatory -- refers the asking party to a document must tell that party sufficient information to allow them to locate the document as easily as it would be for the party responding to the interrogatory to locate the document. That's the test we articulate at the top of Page 5, so that they provide sufficient details so that the interrogating party can locate and identify the document as readily as can the party served. That is a test that I think is used in the Federal Rules.

On the subject of -- let me skip now before I go to expert witnesses because I think the next logical subject is depositions.

Our Deposition Rule appears in several places, but essentially it begins on Page 8, Rule 200. We adopted a Rule that in every case, every case, no side should get more than 50 hours of depositions, 50 hours of questioning of a witness. We said it does not count in that 50 hours the other side's cross-examination of your witness at the

deposition. It does not count in that 50 hours your examining your own expert for the purpose of using his testimony as a trial -- for use at trial. But that -- and of course, breaks in the depositions do not count, and we have dealt with that in Rule 200.

And at the bottom of Page 9 we talk about what counts in the 50-hour limitation. The notion is that the 50 hours, again, we -- some of the local rules that we looked at around the country limit the number of depositions, 10 to a side, eight to a side. We felt it made a lot more sense to just have a number of hours and let the lawyers divide them up however they please. Some lawyer may want to take 50 depositions, very short depositions. Another lawyer may want to spend three days with a witness.

By the way, I think this is going to be so refreshing to practice law under a regime like this. When you get in a case, instead of sending out associates to just go forth and depose, you actually have a sit down and think about what your theories are going to be so that they do not unnecessarily use up your

precious 50 hours. You'll think about what your theories are going to be, what you're going to get from each witness and how much time you're going to spend with each witness asking questions.

To make sure that that is not abused by the defending party, we have provided that no objections can be made during -- while you defend a deponent. The only thing you can say during a deposition is to advise your client on the assertion of a privilege. That's all. Anything else should be go to jail. The notion again, and we made it very clear in our Rule, is that anything that takes place at a deposition should be recorded, a record made or played back, certainly, if it's on video, or read it to the jury. The conference room should be like courtrooms, is the notion of our subcommittee, and what happens in a deposition room should be no different than what happens in a courtroom. And if someone wants to act up or be obnoxious or obstruct the deposition, the jury ought to be able to see that, so we have provided that.

Now, objections are -- I mean, you can

make objections to questions at time of trial. They are not lost forever by not making them, but they are all reserved, and that's basically our procedure. That's what we have done on the subject of -- I think I've barely covered basically what we've done on the deposition front.

We were concerned on the Deposition Rule about the lawyer that badgers a witness, that asks an extremely misleading question that can only be answered in one way, but we concluded, well, that goes on at trial, too; that the defending lawyer has the option of coming back and cross-examining the witness, has the option of objecting to the question, in other words, before it is read to the jury. And there are ways to deal with -- ways to protect themselves, and we cannot allow this continuous objection to form, objection to this, objection to that, to interfere with the deposition procedure. That was basically our fix on depositions.

There was a great deal of discussion about it, and we can get into that in more detail, about the means of taking depositions. Are you

going to do -- and we dealt with the subject of telephonic depositions and depositions taken by other than stenographic means. And basically the view of the committee was that if you take a deposition and you want to take it by smoke signals, great, you can take it by smoke signals. Whatever method you designate in your notice, you can take it.

Now, the other side can come up with a court reporter, a stenographer, and that the Court at the end will figure out who pays for the smoke signal and who pays for the stenographer; but that basically we ought to allow people to have the freedom to experiment with different ways of preserving testimony.

A traditional stenographic record is not needed in all cases, and that -- now, this does not -- by the way, we have a court reporter on our subcommittee who -- and certainly we want to hear from David about his views, but as I read the material he passed to us, David's view is not so much -- and I mean, we could probably have a more heated discussion on this anyway, but his view is not so much to limit the method you can use as to say when you

transcribe it, it ought to be transcribed by a certified court reporter. I mean, maybe that's not it, but that's certainly what the material he passed out -- the thrust of it is that.

Then on the subject of expert witnesses, which is Rule 170 on Page 6, we thought that the simple way to do this is to require that the plaintiff must designate his experts 60 days before the close of the discovery window, so after four months you need to designate. It doesn't matter under our Rules when you hire him or when you identify him. You could have hired him before you filed your lawsuit, and there's no longer this problem of having to identify an expert as soon as you know you've got him. And the plaintiff must designate the expert, and what the plaintiff must do when you disclose your expert is contained at the bottom of Page 6, the mandatory disclosure proviso.

The notion was that -- and we wrestled with the question and basically we concluded that you don't need an expert report and a deposition, which is basically choose between one of the vehicles of conducting discovery

using an expert. Since we concluded that most people will probably want a deposition, we have eliminated the -- or tried to eliminate, through the language we have used in this Rule, the need for an expert ever to prepare a report as such. So when you disclose, you have to put the name of the expert, his address, the subject matter on which he is going to testify, damages, and some general substance of his opinions.

And we have in mind here something -- we need to look at the wording, make sure we've accomplished it, but the notion was enough kind of to let the lawyer get prepared for the deposition but it doesn't have to be exhaustive, because all you're really doing now is allowing the lawyer to get prepared for this deposition and not doing something to substitute for a deposition. And then you have to in your designation provide two days in the next 45 when these experts -- each expert will be available.

And then the defendant has -- the defendant is allowed 15 days after you learn the identity of the plaintiff's expert to

designate their own expert, and that occurs 45 days before the close of the discovery window. And the defendant has to provide the same information and all experts are deposed 45 days after they were identified so it will all be completed before the six months ends.

We dealt with what we thought was a problem, we talked a lot about the problem, of the proliferation of experts like nuclear missiles in an arms race; that that is running up the expense of litigation, and really we should do something about it. There were suggestions that maybe we could limit the number of experts, as some local rules around the country have done.

Our basic thought on that was that there are cases, particularly kinds of cases where you may need a lot of different experts but not a lot of testimony from each one, but a number of them, and that we would go ahead and allow people to designate more than -- well, a certain number of experts. But the notion is that if you designate -- let me see where that is in our Rules. The first two experts you designate are deposed on your -- within your

50 hours. That's part of the 50 hours. You can depose the other side's two experts during those 50 hours. After two experts you -- there's an additional six hours added to the time of the other party to depose your expert or each of your experts.

Where is that in the Rule, Alex? I'm sorry.

CHAIRMAN SOULES: Page 7. Item 5 on Page 7.

PROFESSOR ALBRIGHT: Page 7, Item 5.

MR. SUSMAN: Thank you. So that two experts count within the 50-hour limit. After that, the other side gets six hours of testimony per expert, so there is a price you pay for designating more than two experts.

And Subsection 6 at the bottom of Page 7 is designed to deal with the problem of someone who decides they want to designate a bunch of experts, uses their depositions as a method of auditioning to see who is going to be best, and then selecting from those experts who survived their deposition for trial. And this Rule basically says that if you don't call to trial

someone who you designated as an expert, then the Court has the discretion to charge to you the entire expense of the other side's deposing of that person. Again, we were trying to build in some kind of price to pay if someone unnecessarily designates experts.

That's where we stand, Mr. Chairman, with our work. I mean, that's just kind of a brief summary of what we have today. Now, obviously we will -- we do have and we'll get to you very quickly a suggestion on document request. And then we will turn our subcommittee's attention to other subjects like the need to supplement, the general scope of discovery and what should be decided about discovery during the pretrial conference.

CHAIRMAN SOULES: Okay. Well, that's a good report and it looks like there's been a lot of headway made on the concerns that the Court has expressed and a lot of other people have expressed and the public has expressed about the costs and burdens of discovery.

Where would you like for us to begin, Steve, giving you input for your continued

work?

MR. SUSMAN: Well, I guess the first general thing we need is, is it okay to begin with the approach of imposing limits on the amount of time allowed for discovery, the amount of time each side gets for depositions, and kind of the way we did on experts, you know, the amount of time you give for experts without giving the other side. I guess the question is, if there is a big consensus of the Bar represented and the judiciary represented in this room that that's stupid, that lawyers should -- that we should not interfere with lawyers' freedom to plan their own discovery, that it should be done on a case-by-case basis with a lot of judicial intervention, then we've obviously got to go back.

We're pursuing -- I mean, we can argue about what the proper number of hours is and the proper number of interrogatories and the proper number of months and what begins the window and what ends it and when it ends, but the first question is, is this the right approach, and that, I think, is what we ought to address first because we're working -- we

will be doing futile work if this group is going to shoot that down.

CHAIRMAN SOULES: Well, I think the Committee has given a consensus in prior meetings that some limitations on discovery should be imposed.

Is anyone opposed to that?

Okay. And the approach that the subcommittee is taking is to look at each form of discovery, interrogatories, depositions, and to try to come up with limitations on each form of discovery.

Is anyone opposed to that approach, that general approach?

All right. I think that gives you the answer to that.

MR. SUSMAN: That's correct. That gives me the answer to that.

CHAIRMAN SOULES: Okay. Rusty McMains.

MR. McMAINS: Yes. Luke, I just want to throw out my basic view. I agree with a lot of what Steve is saying and what the Committee's approach is in terms of trying to limit the more complex problem of discovery

involving depositions, expert depositions and that kind of stuff. But it seems to me, to the extent that we limit or are trying to limit that, one thing I am concerned about is limiting the written discovery, you know, either before or after that occurs; because really, a more -- you have to -- to me, it's a real problem if you're going to take away all of the -- you're kind of limiting all the discovery.

HONORABLE F. SCOTT McCOWN: What do you mean by "written"? Do you mean interrogatories or do you mean production?

MR. McMAINS: Well, interrogatories, follow-up interrogatories. Again, I think the six-month period may be fine for maybe some initial limits, but there's stuff that may happen after six months in my judgment that needs to be of concern. And it may be that we just need to go ahead and provide that written discovery, and maybe in the supplementation part, but that there are things that will happen. The law may change. There are all kinds of things that will justify additional discovery and it may be that, you

know, it has to appear reasonable, I think, to the Bar when it first comes out.

And one approach is to at least go ahead and assume that written discovery subsequent to this period is probably okay with less limits, but you know, the other stuff is what you need to have special provisions to conduct.

CHAIRMAN SOULES: Joe Latting has had his hand up.

MR. LATTING: Steve, I was just going to say I have a nitpicker, a nit or two to pick, but basically I think I'd be enthusiastically in favor of this approach your committee has outlined. I think as a trial lawyer I believe I can find out 98 percent of the other side's case within those limits, and I think that the longer we take with discovery the more money we spend, and there's just no way around that.

And this does limit our discovery some, but as Scott McCown said once, if you take the difference between what happens on a temporary restraining order hearing and what happens two years later at the permanent injunction hearing, you just have to wonder how much you

really find out extra in a case. And I think it's -- I think you guys are right smack on the right track, and I'd like to --

CHAIRMAN SOULES: Buddy Low.

MR. LOW: Luke, I think if we do what Rusty is saying, we'll be back where we are. We've got to put a tight rein on all discovery, because a lot of the dispute and the time is over written discovery and so forth, and if we don't put a tight rein on time and everything, we're going to end up where we are, because that's the big cost, judicial, you know, intervention and all that.

I think if the lawyers get together on a certain time limit, they know more about their case, and the more you know the less confused you are and the better you come into focus with the problem. And I think I endorse it 100 percent without even any exception, written or otherwise.

CHAIRMAN SOULES: Steve.

MR. SUSMAN: I did hear Rusty say something that we do need to do something about, and that is, it seems to me there should be some provision for discovery between the

close of the window and trial about things that have happened since the close of the window, like damages in a -- where you're seeking profits and you've got to look at recent business or health. But it seems to me that the limit is to development since the window closed in some way.

CHAIRMAN SOULES: Yeah. We've had a case on file six months where there were two workers injured, and then after -- more than six months after the case was filed, one of those died and that changed things big time. In workers' comp, the difference is -- you know, it's just like the whole thing turned over, so that can happen.

But that can be done, it seems to me, like on motions, so Judge McCown, why don't you discuss that.

HONORABLE F. SCOTT McCOWN: I was just going to say that I think it's just like -- well, as Steve said at the outset, that we're going to have to figure out about supplementation. But the other thing that we really can't lose sight of is that this all can be altered by agreement or by the Court for

good cause.

I can't imagine a Court saying, "Well, the law has changed, so I'm not going to reopen discovery to address that. That's not good cause. Where the worker has died, I'm not going to reopen discovery to address that; that's not good cause."

So I think if we go with a tight window and then we get the supplementation problem solved and rely upon agreement and good cause, it will work.

The other thing I want to just point out is that I think that this works real well with mediation and other ADR forums, because when the window closes and your case is in the box, that's the perfect time, if you've got to wait for your trial setting in these urban counties, to do ADR. And that might itself resolve a lot of the supplementation problems if the case gets settled when the window closes.

I think a lot of what keeps these cases going and keeps the costs going is just the economics of making a living practicing law waiting for your trial setting and you keep churning the file. If the window is closed,

then you're going to go to ADR and get the thing resolved, if you can.

CHAIRMAN SOULES: David Keltner.

MR. KELTNER: Luke, a couple of things. Let me address, I think, Rusty's situation on supplementation.

The Supplementation Rules we've already discussed would cover, Rusty, I think, the majority of the problems that you have. There will be, although you do not have it in front of you, our Motion for Production Rule. Our theory was that there would be no limitations on the amount of requests for production that you could make. There would still be the time period limitation, but that would be a rather open type of situation.

I worry about one thing that we discussed and we argued around it but we didn't join it and so in one respect the subcommittee has not addressed it, and that is whether good cause ought to be the standard for a Court to expand or contract these -- the scope of this limitation. And I'm not so sure that good cause should be it, because we want to have a

body of law interpreting good cause. It has now become a term of art and it doesn't fit really perfectly here because it's been primarily done in supplementation. And perhaps we ought to go to something -- a slightly different standard, and I've thought about it.

We briefly discussed at one time it being more of a discretionary order of the Court, but the problem is that on a case-by-case basis that becomes a difficult situation. But perhaps good cause isn't what we ought to do, but it -- but we need to make sure that it can be expanded if the circumstance is justified.

And I think that the Rule as -- the Rules as written, I think, and as Steve has codified them were pretty good at that, but we need to revisit that issue. The standard could become very difficult and we're going to have to define "good cause," I'm afraid, because it is now defined in a way that wouldn't fit. But that's just an issue that I think is a fine tuning issue we could work out.

CHAIRMAN SOULES: Chuck Herring.

MR. HERRING: I would agree with

that. I think that good cause right now under 215(5) is laden with a lot of construction and it will not translate.

I've got a case, a couple of toxic tort cases. One has 500 plaintiffs and the other has a thousand. I would think everyone would say, well, that's probably a case where the six months is not going to work on and that should be good cause. The Court has to set a pretrial order in a case like that.

But we've had a case down in South Texas where the local judge says, "Nope. Tough. Six months." We ought to be able to overturn that and have some remedy. What is it? How do we give that protection in the Rule or in the construction of good cause or whatever the standard is that you use?

HONORABLE F. SCOTT McCOWN: Can I address that?

CHAIRMAN SOULES: Sure, Judge. Judge McCown.

HONORABLE F. SCOTT McCOWN: If you want to use a different word than "good cause," that's fine. But it seems to me that terms of art mean different things in different

contexts, and "good cause" fits, but I'm not tied into that. Let's just use plain English. Let's just say for a good reason and just say "good reason."

I mean, it seems to me that we don't want to say "for any reason." We just want to say that it has to be a good reason. But to try to define it further, I think is, A, going to be impossible, as it so often is when you're talking about discretion, particularly discretion that affects so many different kinds of cases and so many different issues; and second, there may be a lot of resistance to this Rule in the Bar as a whole, and I think the way to sell it is just to say, you know, we've got this good reason exception, urge that on the judge, and there will be -- I actually don't think this is true, because I don't think it will turn out to be any problem at all in reality. But if it does, there will be a developing body of case law on that. But, boy, I don't see how you could ever define how the judge is to exercise discretion in this area.

CHAIRMAN SOULES: Well, I think what you just said is pretty important. Why do

we have to -- why do we need to set any standard? Just let the judge in his discretion make further orders, period.

And then my sensitivity on this is as follows: Whatever the Supreme Court does in this area in the next few years is not going to be something that cooks in a test tube. It's going to be something that's cooking in the real world, and what we really have to do here is pay a lot of attention to whether what we are proposing is going to work and do everything we can to make it work so that the constraints are not unworkable but that the constraints are meaningful.

And if after a couple of years of this it becomes apparent that the judges are not using their discretion in a way that's consistent with the intent of the Rules, then some sort of good cause or some standard would then be written into the Rules.

HONORABLE F. SCOTT McCOWN: But Luke, let me just -- I think the reason we want to say "good reason" is merely to load the dice. When you say the judge's discretion and you use "discretion" in that sense, then

theoretically the judge could do it in all cases where he wanted to.

MR. SUSMAN: By Rule.

HONORABLE F. SCOTT McCOWN: Or in no case. But when you say "good reason," what you're saying is presumptively the window applies. That's the presumption, and the burden is going to be on the person -- one reason you have the standard is to indicate who's got the burden.

If you just say "discretion," there's no burden placing. The burden is going to be on the person who is asking for the window to be extended, so the standard places a burden. And then the standard says there's got to be a reason. There's got to be an articulatable, if that's a word, reason to extend the standard, and it's got to be good.

CHAIRMAN SOULES: Steve.

MR. SUSMAN: I agree with Scott. I mean, I think what we want to do is place a burden fairly substantial, not light, on the party wishing an exception to get one, because frankly -- I mean, otherwise, I think you just -- if it's the judge's discretion,

the judge can just say on all of their cases that this Rule doesn't apply.

I have no problem with putting in some commentary about the kinds of things we think are good reasons. I mean, if you wanted to do that, you know, put the number of parties in a multiparty case, the complexity of the issues; or what you might consider bad reasons, which might even be more important to put in.

One bad reason would be counsel is just busy or hasn't done anything. Okay. That would to me be a bad reason, that -- because, I mean, the notion is -- the notion is if you can't get the case ready in the next six months, you better send this client to another lawyer. Don't take on the lawsuit if you don't have the time to do it. So the fact that you're busy with other matters, that's not a good reason, and maybe it's easier to talk about what's not a good reason. Or your client who has filed the lawsuit is unavailable for his deposition or he can't find the documents. Whatever it is, I mean, you could -- I just think that we need to make it clear to the judiciary and to the Bar that we mean

business. This is a serious deal and there are going to be exceptions but don't count on it.

CHAIRMAN SOULES: Well, obviously this is something we all need to discuss and get a consensus on.

Alex Albright.

PROFESSOR ALBRIGHT: I think we have not addressed the Pretrial Order Rule yet either in the subcommittee. And in lots of cases, like Chuck's cases, I think those may be cases where it's more appropriate to do discovery subject to a pretrial order instead of a -- you know, taking every single exception to the judge saying, "Well, I need 10 more hours for depositions, I need one more of this, I need another month," but you would have a pretrial order. And I think when we work on that Rule, then it might be appropriate to talk about cases that are more appropriate for different discovery orders.

CHAIRMAN SOULES: And then we've got the concern about whether or not this can be changed by local rule, which we've got in -- one of the earlier Rules says you can't change the general Rules by local rules, but most of

the big urban courts already have changed the Rules of Civil Procedure by local rule. They consider it binding. They've set standing pretrial order local rules in effect and you've got to do all these things after a case is filed.

And 166 says that that can only be done on a case-by-case basis on a motion or on the Court's own motion, but it's case by case, so -- I mean, the Supreme Court has never addressed -- that I know of -- has never addressed that. I never have seen it in the Court of Appeals either, somebody attacking a local rule that sets a structure for every case like 166 or parts of 166, which should only be permissible on a case-by-case basis. But that may be something we need to look at.

Shelby Sharpe.

MR. SHARPE: The Committee on Court Rules will act at its next meeting on a complete comprehensive set of Rules that will be coming to Steve's subcommittee. In fact, some of those Rules have already reached the Chair but did not reach it in time to be distributed.

One of the things that you're going to find coming from Court Rules is a complete rewrite of Rule 166 that Luke was just speaking of. In fact, it's a complete comprehensive package of the entire Discovery Rules that have come out of Carl Hamilton's subcommittee on discovery.

What Court Rules has done and what Steve's committee has done thus far are totally compatible. They are headed in the same direction with same principles. There's no inconsistency with what's being done.

Let me just share with you a piece of information that you need from a national perspective, and I think we need to understand this. Back in the early part of December, the president of our state bar was invited to an ABA summit meeting in Washington D.C. that was supposed to be a meeting of all the presidents of the state bars making up the ABA. The subject was civil litigation resolution and improvement. The president couldn't go, the president elect couldn't go, and so I got nominated and so they sent me.

I sat there and listened to the discussion

and the presentations which were made, and let me tell you what's going on around the country. What we're doing right now is either happening in every other state or has happened within the past two to three years. The very kinds of limitations, the very kinds of steps we're taking to get lawyers to get cases prepared at a minimum of expense and at the same time not compromise the preparation and knowing what the two sides of the case are, those things have either already happened in other states with great results or they are currently being done right now.

The mandate clear across this country is litigation right now takes too long and it costs too much. And every Rule that Court Rules is looking at right now, the criteria we use is is this going to save time, is it going to save money, and at the same time not compromise justice or getting the case properly prepared.

And so where Steve's committee is headed, the principles that they're using, Steve and his committee are right on target with what is going on or has already taken place around this

country, so the question is, is Texas going to get into the 21st century or not? And there's no question this committee and Court Rules are headed that direction.

CHAIRMAN SOULES: Harriet Miers.

MS. MIERS: Well, I've got a couple of things or three things I wanted to ask about or mention with respect to Steve's work, and one is whether there was some discussion of the classification effort that goes on --

CHAIRMAN SOULES: Speak up a little bit, Harriet. The court reporter is having trouble hearing you. I'm sorry.

MS. MIERS: Let me start over.

One question was whether there was some discussion of classification efforts, because I think the people on this Committee tend to be involved in significant litigation, and a lot of litigation is more minor in nature, so the question was, first, was there some thought of -- like for what's done in the Federal system, using the complex litigation classification, or some method by which you

could categorize litigation at its beginning to see whether 50 hours of deposition really solves the problem because that's much more than ought to happen in that particular case or whether it's maybe not sufficient.

The other question I wanted to ask is whether -- I mean, I've had depositions where witnesses will pause for an inordinate amount of time before they answer a question, and I wonder if we're not inviting some -- if this changes the nature of the tactic by using this time limit kind of thing, because I suspect answers are going to get longer, too, if the measure is really -- if that amount of time is used to measure. So these are just issues that I'm sure there are solutions to, but I wonder what thought had been given to them.

I also didn't quite understand, Steve, the no limit on interrogatory sets. Could you -- I'm sure I missed it, but that didn't make -- I don't understand what you said about not having a limit on interrogatory sets.

CHAIRMAN SOULES: Steve.

MR. SUSMAN: Yeah. If I can respond to things, Harriet, while I remember.

As I recall, there was a question of whether you limit the number you -- the overall number of interrogatories is limited to 30. Now, the question is whether we want to propose a further limit and say that there can only be two sets of interrogatories. Cumulatively there can only be 30. Some lawyers on our committee -- one of the lawyers on our committee said he could see the usefulness of submitting two or three interrogatories, taking a deposition, and then following up with two or three more and that he should not have to submit them all and if he wants to divide up his 30 into --

MS. MIERS: -- 30 sets.

MR. SUSMAN: -- 30 sets, into one question in each set, then he ought to be able to do it. So that was the notion on that.

As to your question about classifying cases, you know, we did talk about that. We talked about, well, should we talk about cases by the amount in controversy, which would be one way to do it. The more you ask for, the more time you subject your client to discovery, some kind of dollar -- you ask for an amount of

money, and therefore that puts you on a track and gives you so much time or you depend on trial judges to classify the case.

And basically we came to the conclusion that this is a good first step, that the six months is a good first step because it really ought to cover virtually every case. Even the most complex cases basically ought to be discoverable in six months. That does not mean -- we hope that that is not an invitation for the cases that ought be discovered in six weeks to last for six months. But the notion was let's get kind of an outside limit on what's tolerable and then through experience we may propose sublimits over time. I mean, if this works, the Bar likes it, it tends to work, then you could do something else.

The idea of judges classifying up front we thought was a bad idea because we thought that it just depends on judicial intervention to solve a problem. And you know, if they have pretrial conferences and they bring parties in and they talk about good reasons for changing the schedule, they can do that. But the system works without judicial intervention.

And your final point was the slow rolling of the answers in the deposition. The basic thought of the committee was that -- of the subcommittee was that you had the advantage to you of videotaping depositions. We have now made it clear that what goes on in that conference room should be exhibited to the jury. And I think it would be very useful to show a jury how that witness was answering if the witness was intentionally slow rolling you or making speeches to you.

Again, there are problems with it and we'll have to think about how to deal with them, but the notion was if you get 50 hours where the other side cannot object and with what goes on in that conference room can be in front of the jury, that is a powerful weapon of discovery in the hands of a lawyer. 50 hours of unimpeded questioning that can be recorded on videotape and played before the jury and the other side can go to jail if he says anything, powerful. That was kind of the feeling that we had.

CHAIRMAN SOULES: David Keltner and then John Marks, and I'll get around the

table.

MR. KELTNER: Harriet, let me address just one thing about classification. The Discovery Task Force came up with one classification that would be for much smaller lawsuits. We decided to table that in our subcommittee meeting; to take this first step, see if we were on track, and then we may have a classification for smaller suits as well that would be even more limited than that, that would have virtually no interrogatories and maybe one or two depositions per side. So that's still something that we'll go back to, but we wanted to see how this one floated in front of the entire Committee.

CHAIRMAN SOULES: John Marks.

MR. MARKS: Basically I think it's a terrific idea. I have the same question that Harriet does about the evasive witness, the witness that answers by nonresponsive answers and that sort of thing.

I wondered if maybe there could be something in the Rule that disciplines the lawyer perhaps if his witness is not doing what he's supposed to do, and that is, to get in

there and testify directly. You know, you can take a witness and he can spend all day with unresponsive answers that sound pretty good.

The second thing is, on the use of the experts designated and then in trial, I have trouble with the idea that a lawyer is going to be somehow sanctioned because he doesn't use an expert that he doesn't need. I mean, there could be a lot of different reasons why you decide not to use one. I mean, especially if you're a defendant, you may decide you don't need one, so I think having paid the expense of that expert that you've designated might be a little bit --

CHAIRMAN SOULES: Scott McCown.

HONORABLE F. SCOTT McCOWN: The Rule doesn't require -- and I want to be real clear about this, because I had a similar but slightly different concern. The Rule does not require that the judge tax the cost. It's discretionary. And the reason I had that concern as a judge is I didn't want people putting on witnesses that they wouldn't really put on just to avoid the cost.

And so if you can explain to the judge why

it is you're not calling him -- and the way to make the explanation, to win it every time, is to say, "Judge, I can call this guy if you're going to tax it against me, but if you're not, then I'm going to skip calling him."

And the second thing, just to make a little bit of legislative history here on the playing of the bad conduct, you'll notice in the Rule that it's discretionary with the trial judge. It's not an automatic right to get to play the bad conduct at the deposition. And again, that's something that I urged on the Committee, because whether it's bad conduct or not bad conduct is often going to be in dispute and the force of that conduct. The guy who is urging that it be played, he may think it's actually going to show the jury a whole lot that in fact it's not going to show. So the judge, you know, just as with any witness, to control wasting the jury's time, that is a discretionary call with the judge.

But again, it goes back to the good reason to extend the window or to extend the 50 hours. If you go in and show the judge this witness was arguing with me or this witness was

taking 20-minute pauses before answering questions, that can be a good reason to get more time.

MR. SUSMAN: Mr. Chairman.

CHAIRMAN SOULES: Shelby Sharpe had his hand up, and then I'll get to you, Steve.

MR. SHARPE: Harriet, you'll recall that Steve said that the Rules that they've already presented can be modified by agreement of counsel. That agreement of counsel would affect any case; so therefore, what you're going to deal with is if the lawyers could look at it and say, "Hey, we don't need all of this because our case is so much smaller and doesn't have all that," the parties could agree. All it's saying is that there is an outside limitation.

The Rules that are coming over from Court Rules initially put it in the hands of the lawyers to craft what their case really is. But if they don't do it, then there are certain limitations that the Rule imposes and the Court can also be involved if the parties can't get together.

I think when you see the drafts of the Rules that are going to be coming before this Committee, you're going to find that initially the lawyers are not losing control their cases. They have the opportunity to work within certain time parameters and certain other parameters that are going to require the lawyers to address it, to address their case and get it done. Otherwise, either the Rule is going to control them or they're going to have to go to the Court and the Court is going to resolve it. But I think each case is going to fit within the scope of whether it's a small case or a complex case.

CHAIRMAN SOULES: Steve Susman and then Steve Yelenosky.

MR. SUSMAN: Well, Luke, I mean, what I'm basically hearing around the table is no one has said this is a pigheaded way to go. I mean, I haven't heard any real strenuous objections. I mean, if we can just get a feel that we're on the right truck, I mean, we can begin with some of the individual -- we can go to the individual Rules today and begin hammering them out, I mean, if people think

we're on the right track.

CHAIRMAN SOULES: And I think we want to get to that. Steve Yelenosky.

MR. YELENOSKY: I just wanted to make a point about what Shelby Sharpe said. The premise that Steve Susman stated was that neither the judges nor the attorneys are going to police themselves. And what you just said implies that in a smaller case they will police themselves essentially by agreement. And my question is, why do you presume that they won't in a large case but they will in a smaller case?

And Harriet Miers' point is a good one. 50 hours of deposition in most of the cases that I do, and I'm sure a lot of attorneys who aren't here, is an credible amount of time. And if you're going to have -- if the premise is that they're not going to agree, in a small case the attorney who is not going to agree by default gets 50 hours. So I don't think it's a reasonable solution to say, well, then in the smaller cases they'll just agree to a smaller amount of time.

CHAIRMAN SOULES: Shelby

Sharpe.

MR. SHARPE: The response is this: If the parties don't agree, then the Rule is going to come into play. And if one of them is disagreeing, he can go to the judge and say, "Judge, 50 hours for this case is just ridiculous. I can't reach agreement with my opponent on the number of hours, but this is what it is."

And under the Rules that are coming over from Court Rules, there is a window just like Steve has that if you haven't reached an agreement by a certain date on your case, then you're going to be before the judge and the judge is going to fashion it for you.

So the presumption that Steve said is that, yes, a lot of lawyers won't agree and will have to go to the Court, and sometimes the Courts won't give things. These Rules are going to force either the lawyers to agree or they're going to be before the Court and the Court is going to fashion that thing down someplace within the parameters, so it's going to get done.

CHAIRMAN SOULES: Harriet

Miers.

MS. MIERS: Well, I would like to ask that the subcommittee think about maybe even getting some input from some other kinds of entities like solo practice or section or some entity or type of lawyers that deal with really a good portion of the litigation that clogs the courts right now and see if maybe a first tier of limitation for smaller cases makes some sense to really attack a good number of cases that are on the courts' dockets.

CHAIRMAN SOULES: Buddy Low.

MR. LOW: Luke, we're talking about going back to the judge, but I don't think that we should go to the judge piecemeal every time you have a little argument. I think that if you have to go to the judge to change it, you ought to go under Rule 166 and let the judge cure a number of problems, set a schedule. Because I've found in Federal Court, when you're there and you can't get this, he says, "Okay, we'll have a pretrial conference. We're going to schedule when these depositions are going to be taken." And you do that and take care of the whole thing, rather than

running back piecemeal, "Now, Judge, I need a little more here."

So I think instead of going with good cause or anything like that, if you want something, you ought to refer it back to Rule 166.

The second comment is, you're talking about selling this to the Bar. There's no way you're going to sell a change of this nature, quote, to the Bar. They've got to accept it. We had that problem in the Eastern District when we changed our Rules. The lawyers just said, "I won't file my cases over there because it's on Track 1 or Track 2." We couldn't sell it; it was forced down their throat. And that's the way it's going to be. This change is not going to be popular with the Bar, I can tell you that. They don't comprehend the problem and so we've got to do it. Now, I don't know if we're going to be able to sell it.

And the third comment is that -- and Steve's committee may want to consider this. Lucius Bunton called me when they were doing their Rules. And I told him I thought about

kind of a rocket docket where the parties could agree. They just had no right to discovery unless they agreed on it. Just try it by ambush like we used to. And he said some lawyers and their clients signed up on that. But I don't know if that's feasible in our Rules. But some people have -- they say, "We don't want to spend a lot of money for discovery. Let's just try this case, okay?"

And you give them a trial date, and if they agree on some discovery -- don't come to the judge if you can't agree because you've waived your right to it. And so if the parties really want to avoid the expense of discovery, let them, you know, do it.

CHAIRMAN SOULES: Judge Guittard has a question.

HONORABLE C. A. GUITTARD: I'm curious about leading questions and unresponsive answers. If you don't allow the lawyer to make any objections, can the other lawyer sit by and say, "Aha, that's a leading question. I can object to that when it's over and knock this all out, or I can knock all this testimony out because it's unresponsive."

I wrote an opinion one time, I don't know whether it's a law or not, that said --

MR. LATTING: How long ago did you write that?

HONORABLE C. A. GUITTARD: It said that an unresponsive answer at a deposition, if there's no objection made at the time, you can't object to that at the trial on the grounds that it's unresponsive. You can object that it's irrelevant or for some other reason, but if it's testimony under oath, it ought to be admissible; and that an objection to unresponsive answers is simply a matter of keeping the trial on the track, so I was curious to know what your committee thought about that.

CHAIRMAN SOULES: Steve Susman.

MR. SUSMAN: The committee thinks that -- the committee has opted for the option of you can lay behind the law and keep your mouth shut, which you should, defending a deposition, and if the other side is stupid enough to ask leading questions and to accept unresponsive -- whatever -- all objections would be preserved until time of trial. That

was our notion.

Now, that puts the burden on the lawyers asking the question to know he better not ask a leading question. But we just felt that without a judicial officer present to rule on objections that were being made at the deposition, given the fact that we were limiting the time, the opportunity for abuse was -- outweighed the danger that someone is really going -- I mean, first, my experience has been that when you get a deposition in any event, a judge is going to -- I mean, judges are going to try to let it in if they know it's going to cut out some really good testimony. If they're reading the deposition and they don't think it's abusive -- I mean, leading, that objection I don't think will get very far, the leading objection.

But that was just -- that's the way we -- Judge, that is what we opted for. You've just got to sit there and keep quiet and give the other side a fair share -- a fair chance at the witness.

HONORABLE C. A. GUITTARD: Well, then would it be proper to have a Rule that

objections to leading questions wouldn't apply and that you don't make them later either or unresponsive answers?

MR. SUSMAN: Well, let's take leading questions first. I mean, I think if a lawyer put up for a deposition one of his own witnesses and led him through a deposition, you ought to be able to object to that at trial. You ought to be able to protect yourself. And if the judge thinks it's just blatantly leading, the judge ought to be able to kick out the whole damn thing. I think the objection to leading questions should be preserved for trial.

HONORABLE C. A. GUITTARD: I'm talking about the unresponsive answer. Now, you've seen a lot of cases where you ask a witness a question and he comes back with an answer not to that question but to the next question you're going to ask if he answers yes to that question, and it's perfectly good admissible testimony. It's just that he says, "Did you see so and so?"

And the witness says, "I saw him do so and so and so and so."

Now, that's unresponsive.

MR. SUSMAN: Okay. Now, I think if I'm the lawyer asking that question, I ought to be able to object to that answer coming in at trial. I ought to object to the other side being able to put that answer in at trial.

HONORABLE C. A. GUITTARD: Why?

MR. SUSMAN: Because it was an unresponsive answer.

HONORABLE C. A. GUITTARD: But what difference does it make if it's unresponsive if it's admissible on other grounds?

HONORABLE F. SCOTT McCOWN: Could I suggest a distinction?

CHAIRMAN SOULES: Let Steve and Judge Guittard finish their dialogue. Then we'll pick it up.

MR. SUSMAN: Well, maybe, I mean, possibly the way you would handle it -- I'm not sure how you would handle it, but let's -- I mean, again, the notion is how can we make this as close as possible to trial. When you ask a witness a question at trial and he gives you an unresponsive answer, you object.

The judge then instructs the jury -- the jury has heard the answer, okay, and the judge will instruct the jury to disregard that answer. Now, maybe that's the way it ought to be with the deposition transcript. I mean, maybe the way it ought to happen is as close to trial as possible. The answer comes in at the deposition, the lawyer is allowed to object as nonresponsive, and the judge turns to the jury and says, "Disregard that as nonresponsive."

CHAIRMAN SOULES: Scott McCown.

HONORABLE F. SCOTT McCOWN: Let me suggest a distinction and a possible way to meet both concerns. The reason, as I understand it, for the old Rule that you object to form is to put the person who is taking the deposition on notice because it can be cured, and so you object to form. They're on notice and they can make the option to cure or not to cure. If they decide to cure, the problem is resolved. If they don't cure, then the trial judge can say, "You didn't cure; therefore, it goes against you. I'm not going to let it in."

What happens in reality, though, is that

for the trial judge, the witness isn't there, maybe in California, and the more important the witness and the more impossible to get the witness to trial, then the more the trial judge in their discretion is going to allow the question however bad the form. And so this whole distinction or the reason for the Rule of making the objection at the deposition I don't think has any effect really on the trial.

But there's a distinction between leading and responsiveness, and I agree with Judge Guittard. When the lawyer leads, it's the lawyer doing something wrong for his advantage that happens question after question after question. When the witness blurts out something that's nonresponsive but that is admissible, there's not much point in the trial in trying to boot it out because it's just kind of unfairly pointless. The lawyer could have asked the right question and gotten that answer. It's admissible. It's relevant. Why not go ahead and let it be read.

If you allow, though, objections at depositions about responsiveness, that is the key place that lawyers in depositions get into

it and misbehave, because they'll say, "Objection, that's not a responsive answer," and it's a great opener to get into it.

"Leading" is not such a great opener, and you might want to have a rule that you have to make objections at the deposition to leading questions, but that's -- other than privileged, that's the only thing. Because with leading all you can say is "Objection, you're leading the witness," and that's it, and they've got a decision to cure or not to cure and it's pretty limited. I could live with that.

But actually I think what the committee decided and what I tend to think is that leading is not that bad a thing anyway, generally speaking, and if it happens, it happens and the trial judge is going to let it in anyway. A lot of lawyers can't distinguish between leading and nonleading so why not just forgot about it. But you can separate the two. They don't have to go hand in hand.

CHAIRMAN SOULES: Alex Albright.

PROFESSOR ALBRIGHT: Another

thing we talked about in the subcommittee about this is that if you were worried about your forms of questions and the forms of answers, then you can take your deposition and then you know what you're going to want to use that deposition for at trial and you can take another 10 minutes and reask questions properly and get the answers that you want and that gives you a 10-minute part of a deposition to read into the trial that might actually be better than what you had before. There are not going to be any asked and answered objections. They can't stop you from reasking the question, so it might be able to get you to -- I remember people talking about wanting discovery depositions and using trial depositions and they could use -- you could use some of your time for doing that if it's a really important witness.

CHAIRMAN SOULES: Well, that's one thing that occurred to me. We've talked a lot about how the lawyer defending the deposition can't interject and how the witness may respond nonresponsively or otherwise, but the lawyer asking the question can also be

somewhat intrusive. Suppose he sits there for four hours and asks the same question over and over and over again. Can the lawyer defending the deposition -- the way this Rule is written, the lawyer defending the deposition cannot object that it's been asked and answered.

PROFESSOR ALBRIGHT: But ultimately you can get up and leave.

MR. LATTING: You can seek a protective order procedure.

CHAIRMAN SOULES: But that may be the next day.

MR. LATTING: May I address that?

CHAIRMAN SOULES: Joe Latting.

MR. LATTING: There's a body of Federal law on this that is very close to what your committee is suggesting and it addresses that very question, and it says what the right of a lawyer is who feels his client is being abused. But the cases that I have say that his only right is to seek a protective order. I guess he decides or she decides what she thinks she can do before the judge and then makes that decision. I was just going to say that this --

CHAIRMAN SOULES: I think that should be a part of the Rule. I think we ought to get to some -- either 166 --

MR. LATTING: I wasn't finished.

CHAIRMAN SOULES: Wherever the protective order piece of that Rule is, there ought to be something said that a deposition can be interrupted for a party to seek a protective order. If you can't make objections, you ought to at least be able to do that, and the Rule should probably express that right so that it's clear to people who were not here what the intent of it is.

Joe, excuse me, I interrupted you.

MR. LATTING: I just wanted to address what Judge Guittard and what Steve were saying, and Scott is gone, but I don't think that there's a problem myself with lawyers making objections during depositions, and I don't think we ought to allow lawyers to be silent and then later object at trial to keep testimony out when they didn't bring it to the attention of the other side. I think the problem is when they interfere with your right

to cross-examine the witness through the use of objections. It's not the objection that's the problem, it's not where the lawyer says, "I object that that's leading" or "I object that it's nonresponsive." That doesn't -- that's not a big problem. It's when they go into it, when they get into the middle of it and say, "You need to clarify that question" or "I don't understand the question" or "I don't think the witness understands that question."

Simply to say, "Objection, leading," if we make the Rule say that the objections may be stated and should be stated unobtrusively and without any kind of speech going along with them, there's not a problem with that. I think that fairly advises the lawyer that he may be asking something that's not admissible.

And, Alex, what you said I agree with; that is, you can go back and clean up your deposition. But sometimes you don't know. You may come back from California with several depositions not intending to have used those in chief, so to speak, and then things turn out where you need the deposition. It strikes me as just fundamentally unfair for a lawyer to be

able at a trial to make an objection that he never did call to your attention at the time.

I don't think that this is a big deal, by the way. I think if we make it clear that lawyers cannot interfere with the interrogation of the witness but still make them speak their objections, we would be done with it; that that will cure the problem.

CHAIRMAN SOULES: Well, in some areas it is a significant problem.

MR. LATTING: I mean, just the sake of saying, "I object," I don't think that's the big deal. I think it's a very significant problem to be interfering with the other side's right to interrogate the witness. But I don't think saying "Objection, leading" is going to be a problem.

CHAIRMAN SOULES: Let's go around the table one more time and I'll take the hands on just general comments and then we'll go through specifics. A lot of the things we're talking about now go to some of the specifics of the Rules as they've been drafted, and if you take them up, then we'll be more focused maybe.

Now, let's go around the table. Let's go with Judge Heath to start with.

HONORABLE PAUL HEATH TILL: Did the committee think of the idea of just saying that the first 50 hours was chargeable as cost and if the party on the other side wanted to do more discovery than that, then they couldn't recover their costs and they would be able to do that?

MR. SUSMAN: No.

HONORABLE PAUL HEATH TILL: So if you had a case that was -- that turned out to be really complicated and was really difficult and you were trying to do something with it, if my client wants to finance it and wants to do additional discovery and it's not chargeable to the other side as far as cost is concerned, would I be able to do that?

MR. SUSMAN: No. Our answer to that was clearly no because you're imposing on the other side a huge cost also. They have to defend the discovery. They have to have witnesses present. We didn't even think about that.

CHAIRMAN SOULES: The cost of

the record is only a small piece of the overall cost, I think, is probably part of the answer.

HONORABLE PAUL HEATH TILL: I understand that.

CHAIRMAN SOULES: Buddy Low.

MR. LOW: Luke, on what Joe said, there is a body of Federal law, isn't there, that you can't instruct a witness not to answer? Isn't that --

MR. LATTING: Yes. Yeah. Their cases are very clear about that.

MR. LOW: You just cannot do that, but must go -- and they have some procedure and that may be considered.

I've found that the biggest problem is not objecting, but saying, "Well, we object to that. He's already told you..." and then he gives him the answer and goes through that. That's where it really gets unfair.

But if a lawyer were required to say, "I object, leading" --

MR. LATTING: -- period.

MR. LOW: -- "already answered, repetitious," and his objection must be stated in short, concise terms or -- you know, I

don't know how to define it. That wouldn't really be a problem. The objecting is not the problem, it's the speeches. That's all. It's the speeches.

MR. LATTING: It's the speeches, that's right.

CHAIRMAN SOULES: Okay. Rusty, you're next.

MR. McMAINS: I share the judge's concern and I think it's the concern that's already been expressed about the idea of terminating or not allowing objections to what essentially are obviable objections; in other words, the ones you can get around. It's one thing to say that you don't have to object to something that's not obvious or something that's substantively defective or your objection is to something that's hearsay or whatever. But something that is purely form only, responsiveness, leading, that's classic sandbagging, so that you're going to be able to make that objection later on.

And with all due respect for the quality of talent in this room, I've read a lot of people in this room's records and there's very

few questioning in there that isn't leading, whether it's on direct or cross-examination, obviously. But the direct is of independent witnesses and still tends to be leading, and most of the time that's the most efficient way to handle a deposition when there's not really much time in discovery for just trying to find out what the information is.

I think it's silly to suggest that you ought to be able to lay behind the law and keep all of the fact testimony out of an independent witness, like a police officer, because you led him through the accident scene. That's just silly.

MR. LATTING: With no objection.

MR. McMAINS: Yeah, with no objections made or anything else. That to me is just absurd.

Now, one way to handle it, and I just throw this out for whatever it's worth, and I think we're going to have a chess clock here or something operating, but one way to handle the notion of obstruction of testimony is to deduct the amount of objection time taken by that

party for these types of speeches from their own discovery time. I mean, I don't know if that had -- it just occurred to me that maybe that's a penalty which kind of -- we need it to be self-implementing in a way, and that would simply require that you have some way to calculate that.

CHAIRMAN SOULES: Well, after the lawyer gives the witness' answer, it might take you a while to get the witness' real answer, which is different from what the lawyer gave, and if the witness had just been permitted to answer the question to start with, you wouldn't have to go through that ritual.

John Marks.

MR. MARKS: Following up with what Buddy said, maybe we could not only say you can make objections but state specifically the objections that you can make and put that in the Rules: leading, nonresponsive, period.

MR. LATTING: Yes. Chuck says to number them. Just say "one" or "two."

CHAIRMAN SOULES: There seems to be two ways to fix this. One is to continue to admit those two objections, make them

mandatory; or to eliminate those and eliminate them forever, they can't be made at the deposition and they can't be made at trial. Either way, we're going to be talking about that when we get to that specific part of the Rule in a minute.

I'm going to come around the table. Anybody on this side of the table?

Elaine Carlson.

PROFESSOR CARLSON: Steve, am I reading this right that the 50-hour limit is not per party but per side? Was there any discussion in the subcommittee about otherwise utilizing shared discovery, requests or responses in the written form?

MR. SUSMAN: Yes. We did discuss like interrogatories, which is so many interrogatories per party, the way it's worded now, and we decided to leave that the way it was because that's the way it is in the current Rules. But we wondered -- we did think about that. Should each of these vehicles be per side, or should we make distinctions between the depositions, which we felt should be per side, and the interrogatories, which as our

Rules now word them, are per party. We did think about it.

But as I recall in our meeting we opted to leave the interrogatories the way they were because there's a limit on interrogatories per party now. And we decided that since we're beginning to put a new limit on the hours of depositions, that that should be per side.

PROFESSOR ALBRIGHT: And we decided there was going to be a huge fight over it.

CHAIRMAN SOULES: That carries some more baggage too, of course, and that is interrogatories can only be used against the responding party. So how do you use them against the side if -- I'm sure it can be fixed, but it does have that additional baggage.

Go ahead, Steve.

MR. SUSMAN: I just wanted to say that I don't think the Committee -- I mean, this thing on objections, that's -- I don't think we're going to have a problem with accomodating the view that limited objections during a deposition are okay.

Our feeling was that the ultimate sanction that we want the Bar to be aware of is that what you do at the deposition gets exhibited to the jury. That makes people behave ultimately. Okay? If you have the fear that, you know, your obnoxious objections are going to go to the jury, then this constant "object, leading; object, form" -- great, you just sit there and do it during the deposition you're defending. I don't think it eats up much time either and we can put in something that that's -- you can say, "Object, form; object, leading; object, something else," but no speeches. Nothing else.

CHAIRMAN SOULES: David Keltner.

MR. KELTNER: I want to respond briefly to Elaine's questions and then throw something on the table that we have not discussed until just now, and that is per side.

I think first off the subcommitte's idea was that on the individual vehicle Rules other than depositions, it would be per party. And the reason for that is exactly as Luke said. It's because of how they get to be used at

trial. On depositions it is per side.

Remember, that concept comes -- that is, as used in the Rule as proposed -- comes from Patterson Dental on jury -- allotment of jury strikes, which interestingly, that decision is made at the time of trial after discovery is complete. This decision will be made up front before discovery is -- just when it's starting. I worry a little bit about that. In fact, I worry substantially about that for two reasons: It is difficult to know whether somebody is truly aligned or has a conflict on various answers when the case starts. That is something that is fluid all the way through the case in multi-party litigation, and I would worry a little bit about that.

I think it would be the subcommittee's view that if we were going to 50 hours per party that we would limit the 50 hours significantly, but that's something that we haven't discussed. And you can read this Rule without realizing it. There are only a couple of words that deal with that issue.

I'd sure appreciate some input from the entire Committee on that one, because this is a

difficult concept. We might cure it doing what the Feds have done in the new Rules which do not use the Patterson Dental determination, but that is going to be a difficult situation for us.

CHAIRMAN SOULES: Now, the other place where that "side" business appears, and I don't know how this is used because I've never seen it used, I've just seen it in the Rules, in 265g, where it says, "But one counsel on each side shall examine and cross-examination the same witness."

I mean, sometimes there are several defendants and every one of their lawyers wants to cross my direct testimony and they always get to, but this Rule indicates that they shouldn't get to do that, if "side" means the same thing here that it means in getting strikes, peremptory challenges.

MR. KELTNER: Luke, we intended "side" to mean in the Deposition Rule plaintiff and defendant. That's why I think that's something we need to discuss maybe at this point, maybe later in fine tuning, but I think that is an issue that has some pragmatic

effects that we need to think out a little bit.

CHAIRMAN SOULES: Okay. Is there anything else in general now before we go to the specific Rules.

All right. Why don't we start with --

HONORABLE C. A. GUITTARD: Let me ask one thing.

CHAIRMAN SOULES: Okay. Judge Guittard.

HONORABLE C. A. GUITTARD: I have trouble with respect to the leading question and suggestive answer thing, the nonresponsive answer. Neither leading question nor unresponsive answer is in itself a good reason to exclude testimony. A lot of leading questions are perfectly good, as has been pointed out, but it should be -- I would go along with Steve's idea of don't let them make any objections at the deposition.

And the question is, what objections can they make later at the trial. They ought to be able to make the objection that this line of questioning is unfairly suggestive to the witness or something like that; that it's not

the lawyer testifying but -- it's not the witness testifying but the lawyer who is putting words in his mouth. That ought to be grounds at trial for excluding evidence.

And so far as unresponsive answers are concerned, in a case where the big question is value, you put your expert on the stand and you ask him, "Now, did you reach an opinion as to what the value of that property is?"

He says, "My opinion is that it's worth so many dollars."

Is the lawyer going to -- at the deposition is the lawyer going to say, "Well, what is your opinion," after he has already given it? Well, not one lawyer in ten would do that. So the point is just don't make at the trial an objection to that answer because it was unresponsive. It just ought not to be a good objection and the Rule ought to say so.

CHAIRMAN SOULES: Justice Hecht.

JUSTICE NATHAN HECHT: On that subject, I think you have to think of the dynamic of the deposition. Because what ordinarily happens is that you ask the question

and the other side objects and it's leading. And then what do you do? You either rephrase it or you stand on it, and they object again that it's leading, and then what do you do? You either rephrase it or you stand on it. But at some point, if the other side wants to continue to assert the objection, you go ahead and get an answer to the question. In other words, you make a decision whether you think you're going to get this in or not. But of course, in the process, if the witness doesn't know the answer by now, he's an awfully stupid witness. And maybe this gets at it, but I think either way it shouldn't be that big of a problem.

On a more general note, I'm very heartened and I think the Court will be very heartened to hear of the spirit of these discussions and this work; because there will be some resistance in the Bar to these ideas, but the public is dependent upon us to make some changes in this area, so I think as we go through these Rules it's very important to recognize that they're going to pinch some. They're going to pinch all of us some.

And we can't help but think of cases that we've had or got where maybe this is going to work a little bit or maybe it's not going to work so well. But in all of it I think we have to think in terms of really imposing meaningful limits on ourselves that will not cramp justice but will make it possible for litigation to move along more expeditiously and more cheaply. And as far as I'm concerned, this is a great start and I think the Court will be glad to hear about it.

CHAIRMAN SOULES: Okay. Steve, let's start with, I guess, 166(b)(3).

MR. SUSMAN: Yeah. I think the first Rule we ought to -- I think we ought to flip these in the way that they're ordered so the first thing that people read is 166c. In other words, how you make exceptions ought to come first, and our notion was to have a general provision that deals with all exceptions.

So 166(c)(1), does anyone have a problem with that?

CHAIRMAN SOULES: Okay. Elaine Carlson.

PROFESSOR CARLSON: Why not just incorporate a Rule 11 provision and say parties may have a written agreement signed and filed with the Court modified dah da-dah da-dah.

MR. SUSMAN: Fine.

MR. ORSINGER: Would you articulate that then, Steve? What are you going to change? Or Elaine, what are you going to change?

PROFESSOR CARLSON: My suggestion was after the word "agreement" just put "signed and filed with the Court."

PROFESSOR ALBRIGHT: Why not "According to Rule 11"?

MR. KELTNER: Or how about "Pursuant to Rule 11"?

PROFESSOR CARLSON: That would be fine too.

MR. HERRING: So you're not going to allow an agreement totally on the record during the depo?

PROFESSOR CARLSON: No. The next sentence would, I think, allow that.

MR. HERRING: Okay. You're just going to keep that.

MR. ORSINGER: Read the sentence as modified, if you would.

PROFESSOR CARLSON: The parties may by written agreement, pursuant to Rule 11, modify --

HONORABLE F. SCOTT McCOWN: Could I make a plea here?

CHAIRMAN SOULES: Judge McCown.

HONORABLE F. SCOTT McCOWN: This is an example of what I object to about our Rules, which is the necessity that every Rule incorporate and refer to every other Rule. We have a Rule about how you make agreements, so we have our Agreement Rule, so that in some other Rule where we say this can be done by agreement we don't then have to reference and redo our Agreement Rule. And this is what makes our Rules so hard to read and long and inelegant, and I would like to just drop that out.

CHAIRMAN SOULES: Well, of course, then the question arises is the written agreement in 166(c)(1) a Rule 11 agreement or is it some other type of written agreement?

MR. HERRING: Do you have to

file it?

HONORABLE F. SCOTT McCOWN: Well, in your Rule 11 you just say all agreements made pursuant to these Rules must be in writing, signed and filed with the Court.

PROFESSOR ALBRIGHT: That's what it says, unless otherwise provided for in these Rules.

HONORABLE F. SCOTT McCOWN: Right.

MR. SUSMAN: So the parties may by agreement, pursuant to Rule 11 -- that's okay, isn't it?

PROFESSOR ALBRIGHT: But Rule 11 says --

MR. LATTING: Which says and which states the following --

PROFESSOR ALBRIGHT: -- all agreements referred to in these Rules must follow Rule 11 unless otherwise provided.

So if you're going to say you don't have to sign it and file it, then you put it in the Rule. Otherwise, you would have to sign it or file it.

MR. SUSMAN: Does Rule 11 say

"all agreements"?

PROFESSOR ALBRIGHT: Unless otherwise provided in these Rules, no agreement between attorneys or parties touching any suit pending will be enforced unless it be in writing, signed and filed with the papers as part of the record or unless it be made in open court and entered of record.

CHAIRMAN SOULES: So the litigation that comes here is, does 166(c)(1) otherwise provide in these Rules?

HONORABLE F. SCOTT McCOWN: Well, but then the problem is not with this Rule, it's with Rule 11. If we need to rewrite Rule 11 to say that every time we use the word "agreement" anywhere in the Rules of Civil Procedure the agreement has to meet the following form, we can do that. The problem that you've identified, Luke, is not this Rule, it's some lack of clarity that you see in Rule 11.

CHAIRMAN SOULES: Well, that's your view. I'm not sure everybody shares that. And so we will resolve that one way or another, whether we will defer to Rule 11 or

not where its terms are to be followed.

Steve.

MR. SUSMAN: I mean, Scott, I don't find it that objectionable to just say that the parties may by agreement, written agreement conforming with Rule 11, I don't find that to be such a big deal. Most of us know what Rule 11 -- most of us know that a Rule 11 agreement has got to be in writing, it's got to be signed and it's got to be filed, right? I mean, is that it?

CHAIRMAN SOULES: Elaine Carlson.

PROFESSOR CARLSON: Well, I guess my concern was just that I wanted to clarify for the Bar that an oral agreement -- I think oral agreements or agreements that are not signed just have this propensity for more Court intervention.

And I also think, Judge, as you just said a moment ago, good cause being one thing in the context of one Rule, and I think that's what happens to any kind of a rule.

HONORABLE F. SCOTT McCOWN: Okay. I don't have any problem with what

you're substantively trying to do here. I'm in total agreement with the content of your idea. But when you lose weight, you lose it one calorie at a time. And what's wrong with our Rules -- for example, are we going to say an agreement affecting an oral deposition which is taken pursuant to rule such and so is enforceable if the agreement is recorded in the deposition transcript as pursuant to rule such and so? I mean, I just think we ought to -- you can go back at the end of this process and go through and do all this kind of cleanup, and that's I guess what Bill Dorsaneo's committee is doing, but as much as we can pay attention to as we go along the less we'll have to do at the end and the cleaner a product we'll have.

CHAIRMAN SOULES: Judge, I don't know whether there is anyplace in all these Rules where an agreement can be reached on something, any subject, that doesn't have to be signed by the parties and filed with the Court. There may be someplace, so if all we do is change Rule 11, now we've got an inconsistency in the Rules, and that's my resistance to just changing Rule 11. There may

be someplace in this book where there's a way to reach an agreement without doing it under Rule 11. If there is, we've got to find that too, and we will do that probably in the comprehensive rewrite.

Let's take about 10 minutes, take a morning recess, and then we'll get back together. I've got 10:30. Try to be back by 10:40.

(At this time there was a recess, after which time the hearing continued as follows:)

CHAIRMAN SOULES: Okay. Let's come to order. What we want to do in going through this is not to draft from the table or draft in this session, we just want to get concepts to the subcommittee, to Steve and his subcommittee, to guide the committee, the subcommittee, in the interim between now and our next meeting policywise.

We're really talking policy here, such as in the objections thing. That's a policy issue that we've got to get a consensus on so that Steve's subcommittee knows how to draft the Rule or what the objective of the Rule is going

to be that they're going to draft, so that's what we're going to be doing. And if your comments could be along -- responsive to that objective, we could probably get done with this today so that they will have guidance in the interim.

And they have really done a lot of work. It seems like I got a set of minutes about every week or 10 days from that subcommittee in the two-month interval between now and our last meeting, and I really commend Steve. You've brought this a long way, you and David.

Okay. Conceptually, modification by agreement, does everybody concur with that; that the parties can make an agreement that will modify the limitations? Any objection to that?

Okay. There's no objection to that, so that will stand approved by the Committee.

The next is modification by court order.

MR. ORSINGER: Well, wait a minute, we -- let's talk about the language.

CHAIRMAN SOULES: No.

MR. ORSINGER: You don't want to talk about the language?

CHAIRMAN SOULES: No, not language.

MR. ORSINGER: Okay.

CHAIRMAN SOULES: No. 2 --

MR. SUSMAN: We're going to have --

CHAIRMAN SOULES: Go ahead.

MR. SUSMAN: We're going to have -- No. 2, what I've heard on No. 2 thus far is that people have suggested that maybe we ought to not consider good cause because it doesn't fit. Scott suggested we consider good reason. Someone said we can just consider the Court at its discretion. Are there any others?

CHAIRMAN SOULES: Okay. On that specific issue, what should be --

MR. SUSMAN: -- the standard.

CHAIRMAN SOULES: -- the standard? Is it the Court's discretion or good reason or good cause? Who -- somebody make a proposition and we'll debate it.

Joe Latting.

MR. LATTING: I want to make a proposition that it ought to be for good reason

because I think we ought to load the dice and I think we ought to get away from the baggage of good cause.

CHAIRMAN SOULES: All right. The suggestion is that -- we'll make it a motion, although we're only talking policy here -- that we use the term "good reason" as the standard for the Court to modify the Limitations Rules under 166(c)(2).

MR. SHARPE: I'll second the motion.

CHAIRMAN SOULES: That's seconded. Any discussion?

Steve Yelenosky.

MR. YELENOSKY: Well, this may cross over into the area of language, but I've got to say it anyway. The way it's drafted now, if you just change "good cause" to "good reason," and I was pointing this out to Judge McCown and I think he agrees, it leaves no standard for the Court's own initiative. It needs to be reworded, because it says, "Upon the Court's own initiative or upon the showing of good cause," so it needs to be reworded to say "good reason."

CHAIRMAN SOULES: So whether it's the Court's initiative or a party's intitiative, good reason should be the standard.

Is everybody in agreement with that? Any other discussion on this?

MR. SHARPE: I call for a consensus.

CHAIRMAN SOULES: Okay. Is there any objection to using "good reason" as the standard whether it's the Court's initiative or the party's initiative?

Okay. The consensus of the Committee unanimously is that we'll use "good reason" as the standard and it will apply in either case.

On the meaning of "side," I don't know how you know whether there are going to be jury issues between the parties at the point of discovery, and that's what I would like to hear some discussion on.

HONORABLE F. SCOTT McCOWN: Say that again, Luke.

CHAIRMAN SOULES: The standard of 233 is -- which is cited here. The standard is -- let's see...

PROFESSOR CARLSON:

"Antagonistic with respect to any issue" --

MR. ORSINGER: "Common interest on the matters" --

CHAIRMAN SOULES: Where the parties on the same side are antagonistic with respect to any issue of fact that the jury will decide. Now, that's the standard under Rule 233.

MR. HERRING: No.

CHAIRMAN SOULES: It's uniform. The Supreme Court has already up and down the line -- what?

MR. HERRING: No.

CHAIRMAN SOULES: No?

MR. HERRING: Richard, try it.

MR. ORSINGER: You've got a definition in the second subparagraph of that Rule.

MR. HERRING: The language is different from what is the definition of "side." Now, as I understand it, they are incorporating exactly this definition.

CHAIRMAN SOULES: Where is the definition? Help me.

MR. ORSINGER: It's called "Definition of Side." It's the second subdivision.

MR. HERRING: See, if you have more than one common interest, you're a side.

MR. ORSINGER: It takes two common interests, not just one.

MR. SUSMAN: Yes. That does it, doesn't it? 233, under "Definition of Side. The term 'side' as used in this rule is not synonymous with 'party,' 'litigant' or 'person.' Rather, 'side' means one or more litigants who have common interests on the matters with which the jury is concerned."

I really believe we might ought to repeat that language here rather than refer to 233 so they know exactly what part of 233 we're talking about.

MS. DUNCAN: That's so you don't have to go hunting.

MR. SUSMAN: Okay.

CHAIRMAN SOULES: Okay. Well, anybody that's got this blue book, look at the cases that are cited in there on how that Rule has been interpreted, and maybe a review of

some of those cases may be helpful and the language as well, and several of them are Supreme Court cases.

Alex Albright.

PROFESSOR ALBRIGHT: Well, I think anybody who has studied Rule 233 knows that it's a very difficult determination to decide who is on what side and how to allocate jury strikes and then equalize them. I think we recognize that we're getting into that mess in allocating hours for depositions. I do think, though, we need to think it through more carefully, because I think if you think about it, it will be pretty easy to determine who is on the same side with respect to a particular witness when the -- in a personal injury case, when the plaintiff is being deposed by multiple defendants, they all have the same interest with regard to damages and the issues, particular issues. But I don't really know how we're going to be able to get into that for each particular deposition.

But I do think we also are adamant that we don't want to allow defendants to have 200 hours of depositions when the plaintiff only

has 50 hours of depositions, and I think that's something that we're going to really have to think about how to do this. And it may be through a pretrial order process, and I think we would be interested in any ideas anybody has for practically how it's going to work.

CHAIRMAN SOULES: David Keltner.

MR. KELTNER: I think we can do that in two ways. First off, the problem with the wholesale referral to Rule 233 causes the problem, because all of us immediately think of Patterson Dental and the other cases and those types of things. That definition there, and I think Steve is right, if we repeat that in the Rule and we're not talking about an antagonism that has to be proved, we've got a much clearer picture. The Feds have a good Rule on this in the new Rules. I mean, there's going to be some confusion.

I would suggest two things. I would suggest that we not make the decision for each deposition and each witness; that it has got to be a decision, if it has to be made by the Court, made up front for the entire discovery process. Otherwise, we're going to be back in

front of the judge before all of these depositions, and I think we can probably work with this definition and come up with something that will work.

CHAIRMAN SOULES: Go ahead, Steve.

MR. SUSMAN: You know, it may be that what we ought to do is say that the plaintiffs shall get 50 hours and the defendants shall get 50 hours and not even refer to this side business here. Then in those cases where there are antagonisms between the defendants on certain claims, that would be referred to in our comments on good reason for adjusting the time or giving more time to allow them to explore those claims, and maybe that's the way we ought to do that rather than get into this -- I mean, the Rule ought to be simple to apply.

I mean, the beauty is, if I'm a defendant, you're a defendant, we've got to get together and split up the 50 hours, and that means we need to, if we've got some -- and maybe that's what we ought to do rather than refer to Rule 233 which brings us into this whole

problem. Just say that plaintiffs get 50 hours, the defendants get 50 hours.

CHAIRMAN SOULES: John Marks.

MR. MARKS: I have real problems with that. I think a better way to do it is give each party 50 hours unless a determination has been made pursuant to Rule 233. I'm just not sure that that will work very well, Steve, this 50 hours per side, this 50 hours for the defendants and 50 hours for the plaintiff. That just plain isn't going to work for me in practicality. But if you say per party and then have some provision that if a determination is made pursuant to Rule 233, then it's okay.

CHAIRMAN SOULES: Shelby Sharpe.

MR. SHARPE: You are going to have to address it in some fashion, because quite often on the defense side you have one defendant going after another defendant as much as the plaintiff is going after the defendants, because I have been involved in a lot of litigation in the past several years where primarily a plaintiff may have been coming

after my client but the real culprit was another defendant and not my client. And in the litigation, in some of the depositions that were being taken, I was being very much aligned with the plaintiff in that deposition, but yet in other witnesses being deposed, I would be aligned with a co-defendant, and then sometimes I would be opposite both of them. So there's got to be some consideration where a party is not penalized merely because it's on one side of the docket or the other.

As you're doing discovery, you have to really look at who is being deposed and then where the alignment falls. There's got to be some flexibility either by determination of side or by determination of the individual parties.

Of course, you can also have an abuse on the party side too. What John is suggesting also runs into some potential abuse there on the defendant side of the docket, where the defendants could really load up on the plaintiff's side and yet they have antagonistic differences among themselves. It puts the plaintiff at a very decided disadvantage.

CHAIRMAN SOULES: Put this in focus. What we're debating now is what's going to be the default Rule, because there's relief either by agreement of the parties or by order of the judge for good reason. So what is going to be the standard default Rule from which relief has to be sought?

We've already talked about relief. We're going to let the judge give relief; we're going to have the parties seek relief; we're going to let the parties agree to relief.

The policy we're talking about is what is going to be the standard Rule.

Scott McCown.

HONORABLE F. SCOTT McCOWN: Recognizing that this is a default Rule and that no Rule we write is going to cover all situations, how about something like: Plaintiff shall have 50 hours, defendant shall have 50 hours. In cases where cross-actions or third parties actions have been filed, defendants shall have an additional 10 hours for depositions on issues between them.

MR. SUSMAN: Okay.

MR. ORSINGER: That's 10 hours

for each defendant, or 10 hours total for all defendants?

MR. KELTNER: 10 hours total would be --

HONORABLE F. SCOTT McCOWN: Well, I hadn't really thought it out that far.

CHAIRMAN SOULES: Two types of parties not covered there are third party defendants and intervenors.

HONORABLE F. SCOTT McCOWN: Well, it covers third party defendants, cross-action or third party actions.

CHAIRMAN SOULES: Okay.

HONORABLE F. SCOTT McCOWN: It doesn't cover intervenors.

MR. SUSMAN: Put them in.

HONORABLE F. SCOTT McCOWN: But intervenors would either be plaintiff intervenors or defendant intervenors, so they would come under the plaintiff or defendant provision.

CHAIRMAN SOULES: Without saying that or with saying that?

MR. SUSMAN: I think it sounds good to me.

HONORABLE F. SCOTT McCOWN: You could say an additional 10 hours each, but that seems like a lot of depositions.

CHAIRMAN SOULES: Okay. The concept here, then, is that all the plaintiffs would have a set number of hours as a group. All the defendants would have a set number of hours as a group. And then if there are cross-actions or third party actions, they get 10 hours.

PROFESSOR ALBRIGHT: The defendants as a group get 10 more hours?

MR. ORSINGER: You've got to allocate or else it's going to be a race to take the depositions and use the time.

MR. MARKS: I've got a suggestion. Maybe if there are four or five defendants, let's say, rather than one defendant, and of course, the plaintiff is the one who gets to pick who is going to be sued, maybe a defendant should get -- the defendants should get more hours than the plaintiff, but not necessarily 50 hours per defendant.

CHAIRMAN SOULES: Well, just in response to that, I mean, it would seem like

that the plaintiff gets to pick the defendants because the plaintiff is the one who files the suit and names them. But it's not all that easy, because the plaintiff doesn't have all the options to pick or choose. They have to sue everybody and normally you do.

MR. MARKS: Well, I don't mean that as a criticism, I'm just saying it does put the defendant at a disadvantage if he has things that he needs to do and doesn't have enough time to do them, so maybe defendants as a group should have more time just like they may have more jury strikes, but not necessarily six per party. So if you've got four defendants, you've got so many hours. If you've got three defendants, you've got so many hours.

CHAIRMAN SOULES: Steve Susman.

MR. SUSMAN: Could I ask, this is a tough issue; we need to go back to the drawing board. Would all you-all think about this and drop me a note over the next week with your ideal solution. Seriously, I mean, we need to think about this and I don't want to get hung up on this. We recognize this as a

difficult problem. How do you make it fair and yet make it restrictive without opening it up? We know we've got a problem here, and we've known that 233 was kind of a default for us. We've looked at it, oh, yeah, here it is, define your side. We've got a problem.

You all think about it. If anyone can come up with some ideas, let me know so we don't get hung up on this.

CHAIRMAN SOULES: Except I think I'm picking up a consensus that there would be a fixed limitation on the plaintiffs and on the defendants. They might not be exactly the same limitations, but the limitations would be to the group. Is that --

MR. SUSMAN: I think that's a consensus.

CHAIRMAN SOULES: Is that the consensus of the Committee? You've got to have some basic -- some orientation to the problem before you begin the draft.

HONORABLE F. SCOTT McCOWN: Here is an idea, and I know -- I think Steve is right, we're going to have to send this back to

the committee. But what about something like: Plaintiff shall have 50 hours, defendant shall have 50 hours, intervenors shall be aligned as plaintiffs or defendants; in cases where cross-actions or third party actions have been filed, defendants shall have an additional five hours per side per action for depositions on issues between them.

CHAIRMAN SOULES: Okay. Did I get that right, that the consensus is that the group of plaintiffs and the group of defendants are going to have some limitation that's an aggregate limitation on all of them? Okay.

Does anyone disagree with that?

Okay. That's enacted. Now, is it going to be the case -- is it also the consensus that where there are cross-claims or third party claims, that as to those claims there would be some standard of additional discovery permitted on those issues alone?

MR. SUSMAN: Yes.

CHAIRMAN SOULES: Is there any disagreement with that?

Okay. That's also unanimous. That gives you enough information to go to the drawing

board, doesn't it?

MR. SUSMAN: Correct.

CHAIRMAN SOULES: Okay. Rusty McMains.

MR. McMAINS: In all fairness, I think everybody has been assuming that there's a lot of potential ganging up by the defendants, I mean, to some extent in terms of the ability of defendants to at least postulate cross-claims against one another actually being together and maybe taking advantage that way. But there's also that possibility, of course, for the plaintiffs in the sense that you may have three different lawsuits against basically the same defendants maybe arising out of the same occurence.

Obviously, chemical explosions are classical examples of those. Frequently and not infrequently, plaintiffs file in multiple forms basically against the same defendants. And in that type, and there is a lot of that, whether it be toxic tort or mass disaster litigation, and I realize the arguments are "Well, we've got to go to the judge on each one," but the first thing that people are going

to do in my judgment is that creative lawyers will look for ways to obviate these limitations.

And the question is whether or not we -- that some thought should be given to anticipate at least perhaps numbers of parties and the same occurrences, some -- as to whether or not there's some kind of protection that will be afforded under these Rules in terms of delayed filing of suits by other people that are in as a mechanism for expanding your number of hours automatically or that sort of thing.

I mean, that's the problem I have with this notion of per side, because you -- and it's not cured by the per party. I mean, that's an issue that has to be different just really depending on the case.

CHAIRMAN SOULES: Well, doesn't a piece of this -- I mean, should the Rule say that the relief that can be granted from whatever the default position is, should the Rule express that it could be to further limit discovery or to expand discovery both ways?

Okay. Mike Hatchell.

MR. HATCHELL: I'm not going to

be in the office next week to write you, so this is just food for thought.

I think the default setting ought to be simple, because it's probably going to apply to 85 percent of the cases. How about X number of hours for the plaintiffs, X number of hours for the defendants up to two, X number of hours for each additional defendant up to a maximum number of X number of hours. And then that allows you to take care of the issues between defendants but puts a cap on it in the Rules.

CHAIRMAN SOULES: Well, the subcommittee should consider that as one possible approach.

Alex Albright.

PROFESSOR ALBRIGHT: Just on the same idea but more generally, should we as the subcommittee consider a default allocation? Because another thing we've been doing is assuming plaintiffs and defendants are going to agree on how to allocate these hours of depositions when it may be that what they actually do is one of them says, "Well, I'm going to beat you to it and I'm going to notice up depositions early on and I'm going to use up

all 50 hours." Should we have a default allocation which is kind of like what Mike is talking about where you say, you know, each defendant gets so many hours of depositions, and then if you all can agree to allocate them some different way, maybe that's a better way to do it.

CHAIRMAN SOULES: Maybe you could say it could be allocated equally among the defendants, period. That would be the default. That's another idea.

MR. KELTNER: I'd be interested to see, Luke, what people would think of that idea, because I think in a default position that makes some sense. And if we could get a consensus on that, I think it would guide the subcommittee a little bit.

CHAIRMAN SOULES: All right. Is it the consensus of the Committee that the parties on a side, and I'm using the words I probably shouldn't be, but I'm trying to use them for illustrative purposes, would divide the hours equally unless otherwise agreed or ordered by the Court? Any objection to that?

Okay. That's unanimous also.

Have we given the Committee our general thoughts on policy approach to this? Anything else?

Carl Hamilton.

MR. HAMILTON: I would like to ask one question. Our subcommittee has kicked this around and come up with the same problem. That may be the reason why the Federal Courts opted to have limitations on the number of depositions rather than hours. Have you all discussed that and why you opted for hours rather than giving each party a certain number of depositions and then let him decide what he wants to take?

MR. SUSMAN: Yes. Because our basic notion was to -- our basic approach was to put limits on the outside. The discovery period is six months. However you want to use it up is the lawyer's business. Limits on the number of interrogatories, but the number of sets is your business. Limits on the number of -- I mean, what costs money is the hours spent in depositions. That's what costs money, because if you limit it to 10 depositions, someone can go on with one deposition for 10

days. I mean, that can be outrageous. Courts are very reluctant to stop those depositions.

So our feeling was to give them 50 hours and let lawyers creatively figure out how they're going to divide that time. To me that's the sensible thing to do. Lawyers have then got to sit down, okay, I've got to establish these six points, I've got these witnesses, I'm not going to have any time to ask background questions, I'm going to have to spend an hour with this person, three hours with that person, and again, planning your whole discovery strategy the way you ought to plan it; and that that was a better approach than saying each side gets 10 depositions.

There were some of the personal -- I mean, some of the plaintiffs lawyers, I think, felt that they were more comfortable with an overall outside limit of hours which gave them the freedom to take some very short depositions that they would need to in some cases, whereas limiting them to eight depositions or 10 would not be workable. That's basically -- frankly, I don't frankly see how you sidestep the side problem, the allocation problem, by doing it in

terms of numbers of depositions rather than hours. You've got the same problem.

CHAIRMAN SOULES: Let's see if we can get a show of hands, unless somebody feels it's not ripe for a decision, on whether we should limit it, the discovery, the deposition discovery, to number of depositions or hours on the record.

How many feel it should be by number of deposition?

How many feel it should be by hours on the record? Okay. That's unanimous on that point, so that gives you guidance.

All right. I have some concern about 166(b) and (3), the discovery period.

MR. SUSMAN: Yes.

CHAIRMAN SOULES: And they are -- basically they are amended pleadings to add new causes of action. How is that going to be handled, which may require us to fix or close the pleadings at some point. I don't know what the right answer is to that, but if all the depositions have been taken, is that just something you go to the Court for relief, or how do you handle adding a new cause of

action and how do you handle adding additional parties?

Suppose the discovery has taken 50 hours, all the defendants have taken 50 or whatever the number may be, and you all are going to work that out plus any extra they're going to get, and then it's all been done and a new defendant has been added. Or maybe this is not something we even need to deal with because it all comes under going to the Court for relief. But those are going to be real issues in real cases, new causes of action and new parties.

Has any thought been given to how to handle that, or do you want to just take that back and think about it?

MR. SUSMAN: I think we need to think about it. I don't think we gave this a lot of thought.

CHAIRMAN SOULES: Okay. So that bears on both the size of the discovery and when the discovery period starts, because if it starts from when the first deposition is taken and this party is not even -- this individual is not even a party at that point or at any point in the next six months and now discovery

has been closed, so if you all could give that some thought and then give us your recommendation on how to approach that problem.

Richard Orsinger.

MR. ORSINGER: Some states don't permit unilateral amendment of pleadings. In some states you have to get the permission of the Court to amend your pleadings, so we could give consideration to requiring Court permission to amend after the discovery shutoff and allow freedom to do that up until that time. If you don't encourage somebody to put their cards on the table before discovery is over, there will be some lawyers that will hold back important claims until after discovery is shut off.

CHAIRMAN SOULES: I don't know whether this is something that we can fix in the Discovery Rules or something that would be fixed in the Rules on joinder claims and joinder parties. But somehow that can be addressed if we need to address it.

MR. SUSMAN: I mean, you know, most docket control orders that state courts

are routinely entering now in any event, these pretrial dockets, I mean, many of them are -- I mean, have pleadings -- there are deadlines on filing pleadings. I mean, they have these deadlines when you can amend.

CHAIRMAN SOULES: But this is a Rule that's going to apply in the absence of a 166 order. What you're --

MR. SUSMAN: I mean, my only question is we might have a Rule that just that says all pleadings must be amended by the third month of the discovery window or something like that. I mean, you could say --

CHAIRMAN SOULES: Or after -- or with leave of the Court.

MR. SUSMAN: Three months before the close of discovery, you have to get the pleadings in order, period.

CHAIRMAN SOULES: Well, we have an open field to approach the problem, and if it means -- what I'm getting at is if it means reaching to another section of the Rules that's outside the Discovery Rules, it will be hard to fix this discovery problem. If you have an

open field, that may be better than trying to do it here. It may not be as good as trying to do it here.

MR. SUSMAN: The other problem we have with this, and someone pointed this out, is that there are possibly places, I'm not very familiar with them, where you can get to trial in less than six months or -- and we need something that adjusts this time frame for those places or at least so that -- that's not in here. I mean, the assumption is that it always take more than six months to go to trial.

MS. DUNCAN: But won't that be good reason for shortening your discovery?

CHAIRMAN SOULES: Maybe that's good reason.

HONORABLE F. SCOTT McCOWN: But do you need a Rule about that? Because then the time runs until the trial setting.

CHAIRMAN SOULES: Let's have the Committee just think about that and maybe that's something we don't need to fix here. You can get to trial in San Antonio in the County Courts at Law in six months, and they've

got some pretty sizable jurisdiction.

Alex Albright.

PROFESSOR ALBRIGHT: I'd like to hear some consensus of the Committee about whether you all would be in favor about having a pleading cutoff, because that would be a major change in Texas practice. In Texas practice you can freely amend whenever.

MR. HERRING: Even after trial.

PROFESSOR ALBRIGHT: Whereas in Federal Court that's not true, and I think it may be that we need to change that. But if people feel strongly against it, I don't think we should be spending a bunch of time worrying about it.

CHAIRMAN SOULES: I'd like to leave that just where I did; it's an open field. Because as you all work hard in your discovery subcommittee to come up with an answer to this, you will either decide there's a way to do it in the Discovery Rules or it's really not doable there and it has to be done someplace else; or we're just not going to worry about it and let the Courts take care of it in the form of relief. And I think we ought

to leave all those options open to the committee, if that's okay with you, Steve and David.

MR. SUSMAN: That's fine.

CHAIRMAN SOULES: John Marks.

MR. MARKS: A couple of things. First of all, should we have, you know, a grace period before the six months begins like 30 or 60 days after the suit is filed so that you don't have a guy sending out interrogatories and production requests with his petition or somehow getting that time going too soon?

MR. SUSMAN: It begins, John, only on the taking of the first deposition, so obviously the Rules have the ability -- you can't take a deposition right away. If you're the plaintiff, you've got to wait awhile.

As for the production of the first document pursuant a request, I had thought, now, and I had given some thought to the notion personally of maybe we ought to allow document production and the review of documents to precede the beginning of the discovery window so that production of documents would not trigger the opening of the window but the first

deposition would, but I don't know. I mean --

MR. MARKS: But what if a plaintiff notices a deposition right after you file your answer?

MR. SUSMAN: It's open.

CHAIRMAN SOULES: I think maybe what John -- let me see if I can articulate this. In 166b, the discovery period could stay just the way it is or it could have something added that says "but not sooner than 60 days after the case is filed." I mean, should we have some but-not-sooner-than point of time, is the question I think that you're putting on the table, isn't it, John?

MR. MARKS: Yes. Well --

CHAIRMAN SOULES: Okay. And let's discuss that briefly here so that we can let the committee know whether we want a specific period, not an arbitrary period, but a specific period before which the discovery cannot commence.

MR. SUSMAN: Well, the plaintiff cannot commence it until the defendant's answer date. We know under the current Rules that you cannot take a deposition without the leave of

the Court right -- if you're the plaintiff, until after the answer date, so there's -- the defendant can commence it by noticing the plaintiff's deposition immediately, but that's -- normally people say that should be the case. The plaintiff should have been ready when they filed their suit to get it on, and so what's wrong with the defendant opening that six months right away. I do not think -- I personally do not think there ought to be a waiting period. I think that's a big mistake to have this mandatory two-month waiting period unless the parties can agree on it.

MR. LATTING: That's the opposite direction from where we want to be heading, isn't it?

MR. SUSMAN: Yeah.

MR. LATTING: Don't we want to get it over with faster?

MR. SUSMAN: Right.

CHAIRMAN SOULES: But let's talk about this a minute. I mean, this is a legitimate issue that John Marks has raised and let's talk about it for a few minutes. And we've got Steve's view on it.

Chuck Herring.

MR. HERRING: Just a question, Steve, for your subcommittee. We don't have anything yet in front of us on disclosure. Are you still considering some possible mandatory disclosure, because that could affect this in terms of what's going to be produced when. It still wouldn't trigger -- as I understand the Rule -- wouldn't trigger the discovery period because there wouldn't be a request, but is that still open before your committee or not?

MR. KELTNER: Yes, I think it is. We haven't specifically taken it up, but it is an open question.

CHAIRMAN SOULES: Well, that wouldn't trigger 166(b)(3), not the request, but if there's an automatic production of documents, since --

MR. HERRING: It says "upon request of any party," is the way it reads now.

CHAIRMAN SOULES: Oh, I see.

MR. HERRING: So this automatically wouldn't trigger it.

CHAIRMAN SOULES: I see. Okay.

Is that the intent, that if there's any automatic discovery, making of discovery, that that would not --

MR. SUSMAN: It would not trigger this.

CHAIRMAN SOULES: -- it would not trigger the start of the discovery period?

Okay. David Keltner and then Sarah and then Richard.

MR. KELTNER: The only reason I could see for a grace period would be to give the parties an opportunity to work out a time period or work out what they're going to do with discovery if it's going to be different than the Rules. That might be something that makes some sense. I worry about it being 60 days because that goes contrary to where we're trying to go with this. I think we ought to stay as close to six months as we possibly can.

Are there any other reasons for a grace period?

MS. DUNCAN: Yes.

CHAIRMAN SOULES: Sarah.

MS. DUNCAN: I would suggest

that we consider a 30-day grace period, one to work out agreements, but also have mandatory disclosure of documents during that 30-day period. Because from the little bit of trial experience I have, which isn't much, so you all feel free to tell me I'm crazy, but a lot of the problems that I saw was that we would have all these document requests, everybody would get copies of everything, and then nobody would look at their documents. And they would walk into the depositions and if they had just bothered to look at their documents, they would have half the deposition down.

So maybe if you have that mandated 30-day period where all you can do is look at documents and try to reach agreement, maybe somebody will look at some documents.

MR. MARKS: But you've got to get the documents first.

MS. DUNCAN: That's right.

MR. MARKS: And then you need to have time to look at them.

MS. DUNCAN: That's true. But if you had a mandated disclosure at some very early period -- I mean, in most cases the

plaintiffs aren't going to have much in the way of documents and the defendants ought to know where their documents are, so if you had 10 days after an answer that you've got to produce your documents unless you've got some good reason to the contrary --

MR. MARKS: That's a little soon.

MS. DUNCAN: Now, I'm talking about most cases. I'm not talking about the cases that you work on. I'm talking about most DTPA cases, most promissory note cases. You know, maybe you could make it 30 days. I'm not really concerned about the number, but it seems to me that lawyers have not been willing in large measure to structure discovery to proceed from Point A to Point B to Point C, and maybe we can help them do that with a grace period.

CHAIRMAN SOULES: Let me see, as a predicate to that, I think we've demonstrated a consensus before that there should be some mandated discovery in the Rules. Isn't that right? Is there anyone in disagreement with that?

Okay. So we're going to have some

mandated discovery, and I guess that needs to be factored in to these Rules or at least thought about as to whether or not it's a factor in these Rules, Steve. We don't have that on the table yet, but it will be coming.

Giving that some thought, then tell us what the consensus or what the subcommittee feels about a grace period or delay period during which that mandated discovery is assimilated or should be assimilated, and then tell us what you think and the reasons for it.

Richard Orsinger, and then I'll get to Shelby.

MR. ORSINGER: I'd like to inquire what the procedure would be if the plaintiff or the defendant joins a party in about three months into the discovery period. Is the new party going to be limited to the three months left, or are they going to have their own six months, or are they going to have something between three and six?

CHAIRMAN SOULES: They're going to think about that.

MR. ORSINGER: Okay.

CHAIRMAN SOULES: So that's

already been assigned to them. They've been charged with that already.

Shelby.

MR. SHARPE: One of the things that will be coming over following the April Court Rules meeting is the rewrite of Rule 166 which has this, quote, grace period that's in it. You've got 150 days following the filing of a lawsuit. Also coming over is a Rule that requires certain mandatory disclosure on both sides so that within that 150-day period the parties' attorneys may very well work out when this window is going to start and these other kinds of things.

So I think what you will have on the table and Steve's committee will have would be what happens following the filing of the lawsuit; the mandatory disclosure that's required on both sides is going to be there; plus what would take place during that period of time that would affect when this window opens and the attorneys would have the opportunity, so I think that's going to be on the table.

CHAIRMAN SOULES: And you're going to get that to Steve in the next week or

so?

MR. SHARPE: Yes.

CHAIRMAN SOULES: So that he can at least see where the drafting is?

MR. SHARPE: Yes.

CHAIRMAN SOULES: And whether or not it becomes the consensus of Court Rules, the State Bar's Court Rules Committee, it's still very mature -- it's now very mature in the process, isn't it? It's been in the process for months?

MR. SHARPE: Well, some of it has been in the process for about two years or so.

CHAIRMAN SOULES: Or years.

MR. SHARPE: It's almost in final form. But no, you'll have the draft before we finally act on it.

CHAIRMAN SOULES: Okay.

MR. SHARPE: So we'll act on it April 9th.

CHAIRMAN SOULES: Well, I just wanted Steve to realize and his committee that this is not something that's just rudimentary in its beginning stages. This is something

that's already had a lot of attention, a lot serious work done on it.

MR. SHARPE: Two to three years.

CHAIRMAN SOULES: Okay. Anything else on the question of some delay period? Is there anything else you think we ought to think about? That's all we're talking about here. Okay.

MR. MARKS: Luke, one other question on this.

CHAIRMAN SOULES: John Marks.

MR. MARKS: Maybe we've decided to do deal this later, but if we're going to have six months of discovery, it shouldn't make any difference whether we're in San Antonio or we're down in McAllen or wherever. We ought to be protected during that period of time from trial settings. There should be some provision that if we're going to have six months for discovery then we ought to have it, and the Court shouldn't be able to interfere with that time and put us to trial before we've had our discovery.

CHAIRMAN SOULES: All right. Will the committee, then, consider that issue

and tell us how you come down on that.

HONORABLE C. A. GUITTARD: Are you talking about the same case or some other case?

MR. MARKS: Pardon me?

HONORABLE C. A. GUITTARD: Is the trial setting in the same case or some other case?

MR. MARKS: The same case. The same case.

MS. DUNCAN: He wants six months absolutely.

MR. SUSMAN: He's saying that if the courts are actually faster than this we ought to slow them down a little, is what he's saying.

CHAIRMAN SOULES: In the same case. In other word, you should --

MR. SUSMAN: As I understand it, what he's saying is that if in fact there are courts that are trying cases quicker than six months after they're filed, we ought to -- this Rule should slow that down.

MR. MARKS: That's what I'm saying.

MR. SUSMAN: I understand what you're saying. Maybe that's okay.

CHAIRMAN SOULES: It's not really six months because the suit is filed and then there's service and an answer and that period goes on and then you've got some time after that before the parties either make a production or start a deposition, so it could be more clearly -- it's clearly going to be more than six months. It's going to be at least seven months.

HONORABLE F. SCOTT McCOWN: But I don't see any reason for that. We're not suggesting that cases ought to have six months of discovery. We're providing a window beyond which they ought not go unless it's an exception. But I dare say, in a good 75 percent or more of state cases the discovery would be over long before six months and the trial would be had. I mean, you take your average family law case and they're down as soon as the 60 days has passed. And some notion that a party could obtain automatic delay or ought to have an exception from the Court and go in and ask for an exception to get

a trial setting inside six months seems to me unnecessary.

CHAIRMAN SOULES: Okay.

MR. SUSMAN: Interrogatories.

CHAIRMAN SOULES: And I think we -- would you like to take up next, Interrogatory Rules?

MR. SUSMAN: 168.

CHAIRMAN SOULES: Okay. Let's start off first with the policy issue of no limit on the number of sets.

MR. MARKS: I just have a question.

CHAIRMAN SOULES: Okay. John Marks.

MR. MARKS: Where are we going to leave this? I mean, are we going to just drop it?

CHAIRMAN SOULES: No. The committee is going to look into whether or not they feel that a general Rule can be written that would require the Court to be hands-off on setting the case for trial during this discovery period, whether or not that gets fixed by the Relief Rules or whether or not it

ought to be addressed at all. And given that you've got divorce cases, family law cases and all that, they're going to try to consider that and then bring it back. In other words, it won't be dropped. They will be charged with giving consideration to your suggestion, John.

Okay. Interrogatories to parties. I guess the initial policy issue is dropping the limitation on the number of sets of interrogatories but retaining a fixed or specific number of questions.

Is everybody in agreement with that?

Joe Latting.

MR. LATTING: I'm not. I think as a default provision that we ought to keep two sets of interrogatories as a norm. I don't think there's a reason to expect that people ought to be able to send four or five or six sets of interrogatories. That doesn't happen very often. It happens occasionally when you get kind of a screwy lawyer on the other side, but -- well, you ought to be able to figure out what questions you want answered in two sets of interrogatories usually, and if you can't, you can go to the Court.

But it seems to me we're trying to limit discovery and shorten it, and I'm just -- I think that what we have works pretty well in this respect.

CHAIRMAN SOULES: David Keltner, then Sarah.

MR. KELTNER: I don't think it will work well with a Mandatory -- even a limited Mandatory Disclosure Rule, Joe. That's where I have a difference of opinion with you.

I think you ought to be able to ask one interrogatory or two interrogatories without feeling the need to fill up the rest of your set, and I think that's basically what's happening. I may want to know one fact that I couldn't clean up by a deposition, and I may want to know the contention of a party by saying, "Are you contending X?" Because if --

MR. LATTING: I have no doubt that being able to send --

CHAIRMAN SOULES: Let David finish.

MR. KELTNER: But that's the only reason I have for it.

CHAIRMAN SOULES: Okay. Now Sarah, and then back to you, Joe.

MS. DUNCAN: David said pretty much what I wanted to say. I think it's inefficient to require that there be 15 including discreet subparts in each set, because you may only have one that you need.

My real problem was on the per side versus per party, and that's what we need to get to.

CHAIRMAN SOULES: We'll be dealing with that in a minute.

MR. LATTING: There's no question but that unlimited sets of interrogatories gives you better discovery and you can have more and you can learn more, just like you can learn more in two years of depositions than you can in six months. But if we're trying to limit and hold down the cost of discovery, I can tell you that answering interrogatories costs clients a lot of money. Every time you get a set, you go through a process when you answer them. So I'm just saying as a norm I think we ought to be telling the Bar we want there to be quicker and less discovery. Get this done and get it over

with. That's all.

And if you run out of -- if you run into a problem, you can always go to your friendly district judge and say, "I need to send them some more interrogatories and I have a good reason."

CHAIRMAN SOULES: David, in order to get some orientation, and maybe Shelby too, on this, and Carl, is the concept of mandated discovery. Is that discovery going to be very similar to what is normally obtained in stock interrogatories?

MR. SHARPE: Yes.

MR. KELTNER: Yes. It is in the Task Force's recommendation. Ours is still a request process, but the request is a letter. That's different than their committee. Our theory was that there are some cases in which even mandatory discovery isn't necessary, and so what you do is you just put it in letter and you get persons with knowledge of relevant facts, experts who may testify, insurance provisions; in suits over a document, you get the document the suit is over, and that's basically it.

Our theory basically was that those are things no one really has objections to. Let's not worry about it; let's get that out of the way. And that's why I thought we ought to limit the number of interrogatories, if not just do away with interrogatories.

CHAIRMAN SOULES: Would you put witnesses on that, too?

MR. KELTNER: Sir?

CHAIRMAN SOULES: Witnesses. Instead of persons with knowledge of relevant facts, would you either put them both or just put witnesses?

MR. KELTNER: I think personally that it's time to do away with that distinction. I don't think that interrogatories may be the way to do it up front, because the whole idea of the mandatory disclosure is that's something you do first and then decide whether you need anything more, and I think that at some point we ought to designate witnesses, but maybe mandatory disclosure is not the place for that. But that was the Task Force's recommendation, and let me let Shelby respond.

CHAIRMAN SOULES: Okay. So as that pertains to either the number of questions or the number of sets, and since we have unanimous agreement that we're going to have some mandated discovery, it may be triggered by a letter, but if it's triggered, it's going to be mandatory.

MR. KELTNER: Yes, sir.

CHAIRMAN SOULES: Then it's not going to be through the interrogatory process, so now we're talking about interrogatories beyond mandated discovery -- or mandated disclosure, pardon me.

MR. KELTNER: Yes. And I think we need to answer -- the question is, do we want interrogatories as a discovery device, one; and whether the numbers are right and then the sets are right. But my thought is that if we're going to have them we should sure substantially limit them. Yet the more we limit them, my argument would be the more important it is not to have them in one or two sets, but that's Keltner's opinion.

CHAIRMAN SOULES: Okay. Shelby.

MR. SHARPE: The Mandatory

Disclosure Rule coming from Court Rules would get what you would normally go after in your, quote, standard set of interrogatories and request for production. That's going to be just bang, automatic. It's going to be triggered. Well, not automatic, excuse me. It's triggered by a request.

CHAIRMAN SOULES: Triggered by a letter at some point?

MR. SHARPE: Yes. But it just comes. Now, that's the reason why the idea of Steve's committee having just the 30 interrogatories -- they're going to be dealing with things other than what would be produced by this, and so I think their committee's thought that "Look, we're going to limit you to this," is not unreasonable at all. And it helps you to just tailor it down to some other things. Like as David said, maybe you want to clear up something following a deposition maybe with just one or two interrogatories.

So I think by giving the lawyers the flexibility to do what they're going to do, they would use them prudently. I can't imagine someone trying to say, "Well, I'm going to see

if I can send 31 interrogatories to the other side." Economy of time just says you're not going to do that.

CHAIRMAN SOULES: And the mandatory disclosure, just so it's said on the record, the mandatory disclosure is not going to count against your interrogatories, either the number of questions or the number sets.

MR. SHARPE: No, no.

MR. KELTNER: That's right.

CHAIRMAN SOULES: We're talking about interrogatories as something different than the mandatory disclosure.

MR. KELTNER: That is true under both the suggestions that have been made.

MR. SHARPE: Correct.

CHAIRMAN SOULES: Okay. So we've got one view that we should have limited sets.

Rusty McMains.

MR. McMAINS: I just had a question about the mandatory disclosure part. Is it going to be subject to the Supplementation Rule?

MR. SHARPE: Yes.

MR. KELTNER: It is under ours.

MR. SHARPE: It's under ours too.

MR. KELTNER: Our supplementation is different than the supplementation suggested by the Rules Committee, but yes, it would be subject to supplementation.

CHAIRMAN SOULES: Okay. And we'll be seeing that shortly and debating it with input from all persons interested.

Okay. Are we ready to take a consensus?

I think that first off maybe we ought to take up the number of questions first. Should the default be that no more than 30 questions as defined here in interrogatories, is anyone opposed to that? Okay. We have unanimous agreement on 30 questions.

All right. How many feel that 30 questions should be asked in a limited number of sets? That's four.

How many feel that the sets should not be limited? 10. 10 to four, so the majority has indicated that the sets would not be limited, but the sets in the aggregate can't contain

more than 30 questions as defined.

MR. SUSMAN: The next policy issue we have --

CHAIRMAN SOULES: Let's see, John Marks may have something else on that.

MR. MARKS: I just have one question and it's probably answered in here, Steve. But what about the six-month period, if I send an interrogatory five days before it expires?

MR. SUSMAN: We have not dealt with that.

MR. MARKS: Okay.

MR. SUSMAN: That is a good issue.

CHAIRMAN SOULES: Let's articulate the issue here.

MR. SUSMAN: The issue is, does the termination of the discovery window mean all responses -- all requests must be timed so that the responses are made by the end of the window, or can you serve a request on the last few days of the window getting the response after the window closes? That's an issue that happens all the time, by the way, right now

with these docket control orders. Someone asked in our firm last week where we had research on it. I saw an e-mail come around, so I mean I know this happens.

CHAIRMAN SOULES: All right. Will you all accept the charge of addressing that question?

MR. SUSMAN: Yes.

CHAIRMAN SOULES: And give us your recommendation either that something should be in the Rule or something should not be in the Rule. And if something should be in the Rule, draft that demonstrating whatever the policy is that you think or that your committee feels that the Supreme Court should adopt and then we'll talk about that when it's drafted.

MR. SUSMAN: The next issue, Luke, is does anyone have any problem with the notion of unlimited interrogatories to identify or authenticate specific documents as contemplated by Article 9 of the Texas Rules of Evidence?

MR. ORSINGER: I'd like to make an inquiry.

CHAIRMAN SOULES: Richard

Orsinger.

MR. ORSINGER: Are you maintaining the use of request for admissions, that we'll still have that procedure available?

MR. SUSMAN: Yes.

MR. ORSINGER: Why wouldn't we use that to authenticate documents rather than interrogatories? Because when I authenticate documents, I do it through a request for admissions, if it's of the party. And if it's of the non-party then you have to use -- well, you can't send them interrogatories anyway.

MR. SUSMAN: What I had in mind here more than authentication -- and we may have drafted it wrong; we may have had a little problem in drafting it. We have not done any Admissions Rule, but we need to look at it.

In a document production you frequently get a bunch of documents that are what we call orphan documents. You don't know who wrote them. You can't exactly read what they say. You don't know when they were written or whose file they came from. It seems to me the identification -- that interrogatories are

very useful to identify those kind of documents. You know, "Would you please identify Exhibit A. Please identify" -- now, that seems to me the kinds of things that interrogatories should be encouraged, their use should be encouraged and that we should not limit those.

Now, that's what we really had in mind on these interrogatories, I think, more than authentication, but we need to look at that and we need to look at the admissions issue too.

CHAIRMAN SOULES: But you are asking a policy question. I mean, it is difficult -- depositions don't work very well for identifying, quote, identifying, to use your word, Steve, orphan documents. You sit there, and particularly whenever you're on your 50 hours, and somebody's trying to decide what in the world this is and all that. And it may be that the correct way to do that or one correct way to do that is to permit interrogatories and we would need to define very carefully what that interrogatory can encompass. In other words, let's permit interrogatories for that purpose.

Does anyone feel that the Committee should just drop that notion, or should they pursue it?

MR. SHARPE: They should pursue it.

CHAIRMAN SOULES: Okay. How many feel that that should be pursued by the Committee? Show by hands.

Okay. Those opposed.

Okay. Everyone feels, Steve, that that should be pursued. And I think probably on that issue you will need to be pretty precise in defining what that interrogatory can contain, what a request of that nature can contain, so that it doesn't become a runaway interrogatory.

MR. SUSMAN: Okay. The next thing we have -- I mean, do you want me to just go through the policy issues and highlight them?

CHAIRMAN SOULES: Yes, if you would, please, because you're more familiar with them than I am.

MR. SUSMAN: I think the next policy issue we have that we discussed was

maintaining the practice of having parties sign the interrogatories regardless of whether the interrogatories call for -- or contingent interrogatories -- call for statements of -- we opted to have the parties sign them. We said, "Hey, that will be a neat thing to use to impeach parties at trial," even though we know that lawyers may write them.

Now, that could be A policy decision. Do you want to change who signs them, who authenticates them?

CHAIRMAN SOULES: Does anyone want to change the present practice of parties signing interrogatories, or just the way it is?

Shelby, do you want to change that?

MR. SHARPE: I want to require that they must verify the supplements, which under the Court of Appeals decision they don't have to do in the way they've balanced out -- so I agree with Steve. I just want to be sure that Steve's includes the supplements. I'm not opposed to it. I just want to be sure to include the supplements.

MR. SUSMAN: Okay. We'll keep

that in mind.

CHAIRMAN SOULES: Let me see the hands of all those who feel we should continue the current practice at least. Those in favor show by hands.

Those opposed.

Okay. So your Rule is consistent with the consensus of the Committee on the original interrogatories.

Now, how many feel that the parties should be required to sign the supplements the same as -- in the same manner as the original answers to interrogatories? Is there any discussion about that first? Does anybody want to discuss that before we take a vote?

Okay. Those in favor of signing -- oh, I'm sorry. Pam Baron, go ahead.

MS. BARON: I guess the issue that comes up is what if they don't, is the problem. And that's why the Courts have not required them to verify because they want them to be -- not to exclude witnesses.

MR. LATTING: For example, it's 31 days to trial and your client is out of town and you realize you have a new -- you come up

with a witness. And this is a major deal, if we exclude witnesses because the party didn't sign, or it could be.

CHAIRMAN SOULES: I think it's a major deal in a broader sense. We think that you can supplement discovery by saying that "We supplement discovery," meaning all discovery.

And say this is going to be another expert and this is what he's going to say. There may be a deposition someplace where an expert -- where a party was asked who the experts were. And rather that having to go through -- and I hope this -- that there is some decision, some law out there on it where you can -- instead of having to go through all the depositions where there may have been an answer given, that now has to be supplemented. And all the discovery, requests for admission, every form of discovery, and be specific where it is that you're supplementing, that you can simply say, "We're supplementing and we're giving you this information and we're going to use it at trial," if that is okay, then you're supplementing a lot of forms of discovery where the client doesn't have to sign the responses.

And so what do we do with that?

David Keltner.

MR. KELTNER: Luke, remember that with mandatory disclsure, which is going to take care of the situation with most designated witnesses, that's going to eliminate this problem because we've not required, at least in any of the versions I've seen, verification of that.

MR. LATTING: Okay.

MR. KELTNER: So that takes, I think, 90 percent of the problem out of the practice. I think it's a good idea.

CHAIRMAN SOULES: But does the lawyer sign the mandatory disclosure or doesn't he?

MR. KELTNER: Yes, the lawyer does.

CHAIRMAN SOULES: A lawyer does, okay.

MR. KELTNER: Under the Task Force's rcommendation, and I think under yours, too.

MR. SHARPE: Yes. It's the same.

MR. KELTNER: But let's now change -- let's get off that horse and get on the other problem and that is the one that you're going to use at trial as evidence. And that's the one that I think all of us basically agreed we want verified, and that supplement probably ought to be verified. So I think that since we're looking at it -- well, since we're going to have a new vehicle Rule with mandatory disclosure, I think we're really going to be able to work that problem out fairly well from a practical standpoint, and maybe you all ought to let us work on that.

I worry about the supplementation you're talking about, because supplementation on -- how in heaven's name do you supplement a deposition? If the Court of Appeals decisions are correct that you have to supplement in kind, do you have to re-notice your own client's deposition and then ask him or her that question? Well, I hope not. But that is the logical extension of some of the Court of Appeals' holdings.

I think the issue of supplementation is something we're all going to have to look at

and we haven't taken up yet. And your supplementation idea is one that is problematic as well because things can really -- you can really set up a bad trap there. Again, I think mandatory disclosure as a practical matter is going to take 90 percent of this out of the -- out of being problems.

CHAIRMAN SOULES: Well, supplementation in general, then, needs to be the focus of the discovery subcommittee, and since it has problems beyond who signs supplemental interrogatories, I guess it should be addressed in a broad sense including that question and then get resolved in a package of some kind.

Is that okay with you, Shelby?

MR. SHARPE: Yes, sir.

CHAIRMAN SOULES: Okay. Is everybody in agreement with that? So agreed.

MR. LATTING: Can I ask a question, please?

CHAIRMAN SOULES: I think Rusty had his hand up. Go ahead, Rusty.

MR. McMAINS: All I was going to say is that to deal with the limited timing

problems with regards to timing before trial or supplementation, we ought to be able to provide -- and I don't think it would be terribly objectionable -- to provide that any supplementation that occurs or is required to occur at the time of trial, that there's sufficient compliance if the lawyer signs it and before trial the party verifies it, you know, from a supplementation standpoint.

CHAIRMAN SOULES: That's one way to fix it, so that should be considered.

PROFESSOR ALBRIGHT: Can I --

CHAIRMAN SOULES: Alex Albright.

PROFESSOR ALBRIGHT: One thing, I think a lot of those cases that Shelby was talking about, what they are is they are ambush cases from the other side, where they're not verified but nobody objects to the lack of verification until you get to trial and then you say, "Gotcha. You didn't sign your -- or verify your supplements."

Whereas if there's a requirement that you have to make that objection so they can cure it, then it's just an ambush problem from the other side, I think.

CHAIRMAN SOULES: Joe Latting.

MR. LATTING: Question. Steve and Shelby, I'll ask David, any of you. Where are we headed with the mandatory disclosure and the six-month window and the 30-day supplement for witnesses? How is all that going to work?

MR. SUSMAN: The answer is we haven't thought about it, okay? I mean, the answer is we have not thought about the mandatory disclosure issue and we have not thought about the supplementation. We've got to think about it.

MR. LATTING: Okay. I just wanted to make sure we weren't covering that here.

CHAIRMAN SOULES: No. They are charged to address those problems, those issues. If we haven't covered that already today, we'll do that and they will address that, I'm sure.

What's next on there on the policy issues?

MR. SUSMAN: The next policy issue is have we indeed, on Page 4, on contention interrogatories, have we

sufficiently dealt with the problem? That coupled with the comment on Page 5 with what we perceive to be the -- you know, the marshal-all-your-facts kind of interrogatory, which we feel is abusive; tell me everything you know or could possibly know that supports this contention.

MS. DUNCAN: One thing it doesn't deal with that I at least have had a problem with is documents. Tell me every document that supports your claim.

HONORABLE F. SCOTT McCOWN: Say that again, please.

MS. DUNCAN: Tell me every document that supports this claim.

PROFESSOR ALBRIGHT: That's not allowed.

MR. SUSMAN: We've tried to disallow that.

MR. LATTING: Is that the law now?

HONORABLE F. SCOTT McCOWN: No.

MR. LATTING: Okay. I've got one right here and I have no idea whether to answer it or not.

MS. DUNCAN: All I'm suggesting is that maybe we can say in the comment that that's not allowed.

CHAIRMAN SOULES: David Keltner.

MR. KELTNER: The problem I think always with contention interrogatories has been they are very effective if handled correctly. They also seem to make the other side do your work for you, and that's the big objection. And that, Sarah, is the --

MS. DUNCAN: That's where I have problems.

MR. KELTNER: -- is the horrible clashing. I think what we tried to do, and I wish I could take credit for this but I think Steve is the one who authored this, is to come up with something that would allow limited use of it and not require somebody else to put everything together for you so you're not marshaling evidence. And I think it's designed to be a compromise so that there is a line drawing question here, and I think probably what we need to figure out is if you think we drew the line in the right place or not.

CHAIRMAN SOULES: I think that is the question. In other words, did we draw the line at the right place? If the responses to contention interrogatories are not going to limit what proof is allowed at trial, why even have them?

MR. ORSINGER: Let me comment. That's not what this comment says. It says that a trial court should not exclude evidence because it wasn't listed in answer to a contention interrogatory if you can show that they had independent knowledge of the evidence. So there would still have to be some discovery on it whether it's in the form of an objection or if it's their own record that they produced to you or whatever.

The way I interpret the comment is that you would have preclusive power if you could show that you didn't get it in any form of discovery and they didn't give it to you on a contingent interrogatory.

But that being the case, I'm a little bit troubled about third party testimony, because particularly in the kind of cases that I try, it's very difficult for me to anticipate what

third party witnesses are going to say and it's just not practical for me to interview all of them exhaustively about what they might say.

And so if you ask me as a contingent, "What evidence do you have to support this claim," and I'm relying on -- and I generally provide that a third party is familiar with certain kinds of activity and then I get into a trial and I elicit a response and the other sides says, "Wait a minute, you didn't put that in your contention interrogatory and nobody took their deposition or that question wasn't asked on deposition, I don't have independent knowledge of it," all of a sudden I'm precluded from having persons with personal knowledge testifying to something because I didn't find out exactly what their testimony was going to be in advance. And I think you've got to be careful that you don't do that.

PROFESSOR ALBRIGHT: But all you're required to do is --

CHAIRMAN SOULES: Alex Albright.

PROFESSOR ALBRIGHT: I'm sorry. I drafted the Rule and it was hard -- it was very difficult to articulate this, as I think

we're all having problems doing. I think you're only required to give the general substance or -- what did we finally decide, the -- to generally state the facts that that witness was going to say, generally state the facts which support that contention, and so you would have generally stated the facts.

And their objection would be, "Well, your general statement of the facts did not include this."

Well, maybe that should -- and if they had no other knowledge of that, maybe that should be grounds for exclusion, because if you were going to elicit those facts, that general substantive fact as part of your case, you should have known about it beforehand.

MR. ORSINGER: Well, if I may respond to that.

CHAIRMAN SOULES: Okay.

MR. ORSINGER: I'm troubled by the policy that I have to completely disclose all of my trial testimony in answers to interrogatories or by deposing witnesses I'm going to call at trial. I'm not sure that we're helping the discovery problem if we do

that because you're going to force lawyers, I think, to over-pretry their case to be secure that they will be able to present their case in trial. To me that's going the wrong direction.

MR. LATTING: Boy, I agree with that.

PROFESSOR ALBRIGHT: But I think that's what we were trying to keep from happening, because right now you can ask a contention interrogatory, "State all facts on which you base your contention that there was fraud," and people can try to get excluded particular facts that were not identified in the answers to the contention interrogatory but they were disclosed in depositions or in documents or whatever. Now all we're trying to do is -- this is really a pleading rule where you're in effect saying, "Give me more particulars about your allegations that you made in your pleading, give me more particular facts about your allegations."

MR. MARKS: Well, isn't that what contention interrogatories do?

PROFESSOR ALBRIGHT: Well, that

was the big discussion that we had. And I think the feeling was that what a contention interrogatory is is it's a special exception done through discovery instead of by going through the Court. It is a pleading tool. It is a way to get more particular allegations from pleadings, whether that be "give me more specifically the facts that make up your allegation," or more specifically, "give me the legal theories that make up your allegation." So it's really a pleading tool instead of a fact discovery tool, and I think that's the problem because it deals with pleadings instead of fact discovery as we know it.

I think it's an important tool so that we don't have to have a special exception practice, to go to the judge every time and say, "Require this person to give me more specific allegations in the pleadings and have more amendments of pleadings," so it's an important tool, but it's doing something very different than most of our discovery tools.

CHAIRMAN SOULES: That's the reason it was put into the Rule, when was it, in '84, I guess, was to be another way to get

at special exceptions. I don't know whether it worked or not. It may or may not be worth the candle, but the -- so that we wouldn't have to do judicial intervention in order to get a definition as to what the parties were really claiming in a case. That's just some information.

MR. MARKS: But there's the other stuff that goes along with it that's causing the problems. Because the facts and all that sort of stuff, if you fully understand the contentions, I mean, most of us know what the facts are going to be when we get to trial.

CHAIRMAN SOULES: Richard Orsinger.

MR. ORSINGER: I would say that this is maybe the wrong policy direction to be going to have preclusive effect to these contention interrogatories.

My personal belief is that we will have a better litigation system if a party says, "Be on notice that the following five witnesses have knowledge about some certain aspect of this case." And then if you're interested to

find out what they have to say, you can have an investigator or you can call them yourself or you can take their deposition. But on discovery to say that if you don't develop in the discovery record what every trial witness is going to say or we can keep it out, that forces lawyers to over-try their case in discovery and then retry it again in trial.

And what we ought to be doing is we ought to be saying, "In fairness, I've got the following witnesses that I think I may call that may talk on this subject and you're free to talk to them and you're free to depose them if you want, but don't make me put their entire testimony in my answers to interrogatories and don't make me use up my limited deposition time developing their evidence for you when you can just call them on the phone and do it outside of the discovery process."

CHAIRMAN SOULES: I think we're talking about two different things now here. We're talking about persons with knowledge of relevant facts and the general substance of their testimony. At least one person feels that that's as far as you can go. You can get

the substance of their testimony; you can't get the details of it.

And then another -- it seems to me it's a different -- that contention interrogatories are something different than that.

MR. ORSINGER: Well, if the contention is --

CHAIRMAN SOULES: And the response to persons with knowledge of relevant facts or witnesses, which I think it ought to say instead of just persons with knowledge of relevant facts, and then you get the substance, then that puts the lawyer -- the adverse lawyer, I think, then should be able to rely on that in deciding whether or not to take a deposition. If that's all he's going to testify about, I can handle that at trial.

But then if you get to trial and it goes beyond that, then I don't think the Court ought to permit that it can go beyond the substance of whatever he disclosed, because you haven't given -- if you're going to do that, the only thing to do then is to depose every witness that's listed, because even though you say the substance of the testimony of that witness is

X, whenever you get to trial you've got to prove X, Y and Z and A, B and C as well. And I wouldn't worry about it on X, but I'm very worried about it on everything else, so I've got to go depose the witness and find out what may be their trial testimony.

So I think that requiring identification of the persons or witnesses and the substance is a shortening tool to the discovery process not a widening tool.

Sarah.

MS. DUNCAN: I appreciate how difficult this must be to try to draft. I think this goes too far, and maybe it's because I've been on the receiving end of too many contention interrogatories where I had 60 years of documents. I had 60 years of people's lives and testimony and everything else and I had eight defendants phrasing each of the contention interrogatories slightly differently and spending eight months of my life answering them.

And when you say, "Generally state the facts," that doesn't say to what level of detail you've got to go.

And when you say, "Specifically state the legal theories," how specific? I mean, can I just say, "Breach of fiduciary duty," or do I have to say, "Participation in what they knew or should have known was a breach of fiduciary duty by a fiduciary and therefore the two-year statute rather than the four-year statute"?

I mean, I really think these are a way that most -- most often, the way I have seen these contention interrogatories used is to shift trial preparation and learning of the documents and the facts and the witnesses to create costs or impose costs on parties who can't afford them.

PROFESSOR ALBRIGHT: I would say --

CHAIRMAN SOULES: Given that the purpose back in '84 for this was to try to obtain definition of the claims other than by special exceptions, would it be reasonable to consider having the responses to contention interrogatories governed by the same Rules that govern pleadings; in other words, that amount of notice?

Castlebury or whatever, we've got some

fairly good case law about what -- the extent to which pleadings must go.

Alex Albright.

PROFESSOR ALBRIGHT: I've looked at that. I pulled up the cases on pleadings and I went through the Federal Cases on More Definite Statement of Pleadings. The Federal Cases on More Definite Statement of Pleadings only refer to pleadings when you just cannot tell at all what's going on from the pleadings.

It's the same thing in the Texas Cases Regarding Fair Notice of Pleadings. The standard for pleadings now in Texas is fair notice. That has gotten to be a very, very low standard. It's -- you know, and the idea is you get fair notice -- see, that's why we thought, well, maybe we would use some word like "fair notice" in the contention interrogatory wording. But "fair notice" means a low standard, and what the contention interrogatory is for is to get you some more information than fair notice.

It may be that what we should do, since we do not have a motion for more definite

statement of pleadings in Texas, although I think Bill is going to ask you all to do one, is to say that a contention interrogatory is to ask for a more definite statement of the pleadings and tie it more directly to pleadings. Because I would say that just based on the comments that I've heard here that we have failed in doing what we tried to do. I think what we tried to do was exactly what you were saying needs to be done.

MR. SUSMAN: Well, can I ask this question?

PROFESSOR ALBRIGHT: And we haven't done it.

MR. SUSMAN: What is wrong with doing away with contention -- can I ask this question: Who thinks that if we just did away with contention interrogatories that we would greatly handicap the discovery process?

CHAIRMAN SOULES: How many feel that you would greatly handicap it?

MR. SUSMAN: Yeah. By just doing away with them altogether.

CHAIRMAN SOULES: Well, we sort of have an orientation that we have to file

special exceptions before trial, and we'll go in and say, "Judge, it's okay, overrule them. Our only purpose is we don't want the presumption that this pleading covers the entire universe because I didn't make special exceptions, so overrule them." And then we know that if it's not stated in the pleadings pretty clearly, we're not going to have to try that question.

MS. DUNCAN: What we have is a pleading problem, not an interrogatory problem.

CHAIRMAN SOULES: So we use special exceptions anyway, but that may not be getting at the same problem.

Scott McCown.

HONORABLE F. SCOTT McCOWN: I don't know how you solve the problem, but the problem is that pleadings can be very general and can give you fair notice, kind of, of the facts, kind of what the dispute is about, but not really give you notice of what different legal theories may be invoked. And it's hard to get special exceptions sustained because what the trial judge invariably says is you get

that through discovery. And all the fair notice cases talk about how all you need is fair notice because you get that through discovery. They assume some kind of contention interrogatory practice.

I tried a case recently that's a real good example. It was a case against Amway Corporation where for years they were going under the DTPA. Well, then the plaintiffs' lawyers real late in the game got the notion of looking at the securities statute, which was a far more favorable legal theory on the same facts.

And there has to be a way to flesh out and tie down and hold still what the legal theory is. And whether you do it through pleadings or whether you do it through contention interrogatories, there's got to be a way to do it.

CHAIRMAN SOULES: Does anyone disagree with that?

So everybody is in agreement that we've got to do that one way or another. And probably the practice is that it needs to be done in discovery somehow. Is that also an

agreement?

It either has to be done in pleadings or in discovery?

MS. DUNCAN: I think it needs to be done in the pleadings. I think it's a pleadings problem. Fair notice is too low of a standard.

And for instance, in that case, I have a 75-page pleading that told anybody that could read what my case was about, and you get the contention interrogatories on top of that.

PROFESSOR ALBRIGHT: They just want to screw you around with it. That's their only purpose for them.

MS. DUNCAN: That's right. And it's my view that because we have a pleading problem we've developed contention interrogatories. We ought to get rid of contention interrogatories and require people to plead what they really mean and stick with it. If you want to plead with DTPA or the securities code or breach of fiduciary duty, it needs to be in your pleading.

CHAIRMAN SOULES: Okay. I think there's probably a division in the house on

whether this problem should be solved in pleadings or discovery. We've had a pretty thorough discussion on that, it seems to me.

Could we get a show of hands and try to get a consensus so that the discovery people can know so they can get some direction on this.

How many feel that the problem should be solved in pleadings?

MR. ORSINGER: As opposed to?

CHAIRMAN SOULES: As opposed to contention interrogatories.

MR. LATTING: What if you're hand goes -- can I put my hand up like that (indicating)?

CHAIRMAN SOULES: 10 and a half.

How many feel that it should be in discovery?

MR. ORSINGER: I think it ought to be done in both.

CHAIRMAN SOULES: Three.

How many think it should be done in both? Three.

MR. KELTNER: I'll vote again.

MR. ORSINGER: I think for

purposes of analysis we ought to differentiate contention interrogatories from a request that you state the theory of your case, which is lawyer talking to lawyer, and a request that you state the evidence to support your case.

I have a bigger problem with the latter one than the first one, and it may be we ought to consider them independently. We might want to include one or exclude one and leave the other. But right now our debate has included both of them as if a contention interrogatory can either require you to state your legal theory or require you to state all the evidence to support your legal theory, and I think we ought to analyze those two separately.

CHAIRMAN SOULES: Well, right now I don't think pleadings require you to state your legal theory.

MR. LATTING: No. Fact.

MR. ORSINGER: A contention interrogatory can -- I thought a contention interrogatory could require you essentially to --

CHAIRMAN SOULES: Pleadings don't require you to state your legal theory

under the present law.

MR. ORSINGER: No, I agree. I think we ought to make -- I think we ought to be able to force a party to state their legal theory both in their pleadings and in their -- it doesn't bother me to do it in their discovery.

And then the abusive situation that Sarah had is something that we haven't even discussed yet, which is that if you have two plaintiffs of three plaintiffs or four defendants, each one of them could send a set of interrogatories and you could have 400 interrogatories in one case.

I know that the answers of a party can only be used against that party, but if you've got three plaintiffs and four defendants, each one of them can send 30 questions and that's 120, and we're not doing anything to stop that in the multi-party litigation that I've been in in the past --

CHAIRMAN SOULES: That's another issue. Let me see if we've got a division in the house on this: Just abolish it, to start with, abolishing contention interrogatories

altogether. And that may be the path of least resistance and I'm not trying to suggest that we should that at all. I just want to -- we've given it whatever soul searching we can here at this moment. Do we need them at all? And then we'll start there from that question.

How many feel that there should be some access to contention interrogatories? 10.

How many feel there should be no contention interrogatories? One, two, three -- Sarah has voted both ways on this.

MR. SUSMAN: Can I make a suggestion?

MS. DUNCAN: I'm holding up just about a quarter of an inch.

MR. SUSMAN: Luke, can I make a suggestion?

CHAIRMAN SOULES: So we will have contention interrogatories, so now the question is the scope of the contention interrogatories.

MR. SUSMAN: Can I make a suggestion?

CHAIRMAN SOULES: Yes, Steve.

MR. SUSMAN: Here is what I will

propose to do: I will get some associate in our office next week to go through the Federal Rules Reporter and the State to come up with examples of about 15 different types of contention interrogatories. I will send them out in a questionnaire to this Committee and ask you to vote whether you think it's a proper or improper interrogatory or you don't have any opinion. How about doing something like that where we actually see the concrete examples before us of what is a contention interrogatory?

CHAIRMAN SOULES: That's fine. So charged.

MR. SUSMAN: Because I think we're just now -- well, what is one, and there are so many different things that come to mind.

CHAIRMAN SOULES: Good idea.

PROFESSOR ALBRIGHT: How about people on this Committee send you examples?

CHAIRMAN SOULES: Okay. Carl, did you have a comment on that?

MR. HAMILTON: I just wanted to say we first looked at amending Rule 91 on special exceptions. And if an exception was

sustained limiting discovery, there can't be any discovery on that exception unless the pleading was put in proper shape with proper notice given. We thought that was unworkable because judges don't give you hearings on special exceptions in a timely fashion and there was some problem about limiting discovery to the pleadings because everybody wants wide open discovery.

So then in our mandatory disclosure we've provided a sort of contention interrogatory, which is a requirement that the factual basis to support each claim with sufficient specificity to give the defendant fair notice of the factual basis for each claim of the plaintiff was stated, and along with that the legal theories upon which each claim was based, and they should be set forth with sufficient specificity to give fair notice and where necessary, for reasonable understanding, citations and pertinent legal authorities can be -- can be had.

This is a sort of a contention interrogatory to try to force in the absence of forcing a pleading to be specific. At least

with the response to the mandatory disclosure the party has to be specific on the complaint or the defense, and that then should govern the scope of discovery.

By the same token, on witnesses, we expanded that, or people with knowledge of relevant facts, to not only have to list the person and the general subject matter about which each person has knowledge but, to the extent that it's known at the time of answer, a summary of the main facts favorable to that party answering the request about which such person has knowledge.

So if you get a list of 15 people that witnessed the accident and only one of them saw someone take beer cans out of the car, you don't just answer by saying generally, "He knows about the accident, he was out there," because then you have to take 15 depositions to find out who saw the beer cans.

So if that requirement is put in, that "facts favorable to that party be disclosed," at least it cuts down on some of the depositions.

Now, you don't have to disclose

unfavorable facts. You have to leave that up to the other side if they want to find those, but that tells the party then why you may be calling that witness as to what favorable facts and then you can decide whether you want to depose that witness. These are just some ideas that you might want to plug in.

CHAIRMAN SOULES: On the two points that you made on contention interrogatories, can you get those to Steve so that he can put those in his questionnaire among the others that he comes up with?

MR. SUSMAN: That would be great.

CHAIRMAN SOULES: Would you do that, Carl, for me?

MR. HAMILTON: Yes.

CHAIRMAN SOULES: Give those to Steve early next week, if you can, so he can start putting his questionnaire together or his associate can start working on it.

Okay. Anything else on contention interrogatories right now? We're going to try -- we probably have some more policy issues but we've only got about 15 minutes

before the meeting is going to adjourn.

David.

MR. KELTNER: We had some guidance from the Court on this, remember, in our last meeting when we discussed generally these things. And then at one of the subcommittee meetings it was pointed out to us that -- and it's certainly true in the new Federal Rules and the like that the Courts are going opposite where our discussion has gone on the issue of notice pleadings. And the Courts -- in my opinion, I get the feeling that they are going to be very reluctant to address a Pleading Rule. That means to me that contention interrogatories probably ought to stay in.

The Discovery Task Force addressed it a different way, just so you'll know, than the Court Rules Committee did. What basically we said -- there was some difference of opinion. Interestingly, there was -- basically Sales and Perry agreed that we ought not have contention interrogatories.

Then we thought, well, there's some things that you really ought to be able to ask that

even under any pleadings situation you wouldn't be able to, like "Do you contend that the plaintiff had notice of X?" If it's on a defensive point, for example, and you're asking it, no requirement would be in the pleadings. No requirement would be in the pleadings. I think there ought to be very limited contention interrogatories.

CHAIRMAN SOULES: Okay. Well, we're going to get to that and your committee is going get to that.

Shelby.

MR. SHARPE: The quickest and cheapest way to avoid contention interrogatories is at the pleading stage. Now, if you're not going to deal with it at the pleading stage, then the next place before you get to contention interrogatories is mandatory disclosure which gives you the information.

What Court Rules concluded was that since we didn't figure we were going to be able to persuade the Court to change as far as pleading requirements would go, we felt that the way we could head off contention interrogatories was under the mandatory disclosure.

I think Steve's question of what about getting rid of contention interrogatories altogether, I think that's the way to go. Get rid of contention interrogatories altogether --

CHAIRMAN SOULES: We voted that down.

MR. SHARPE: -- but require it in mandatory disclosure and that way you've got it and you're saving everybody's time.

CHAIRMAN SOULES: Okay. But we voted the other way on that, the abolition of them altogether. If it gets fixed by mandatory --

MR. SHARPE: We voted both ways on it, actually.

MR. MARKS: We voted both ways.

CHAIRMAN SOULES: Okay. Are there any other policy questions on these Discovery Rules, Steve, that you need some guidance on?

MR. SUSMAN: Now we go to experts. Have we done -- is it okay to say that experts are going to be deposed so let's do away with the reports?

CHAIRMAN SOULES: I don't think so.

MR. SUSMAN: I mean, not have both reports and depositions. Isn't that a waste? Does anyone have a strong feeling on that?

CHAIRMAN SOULES: Mike Hatchell.

MR. HATCHELL: I just have a question, Steve. Is that concept so broad as to include the situation where, if I'm to depose your damage expert, is that going to present me with a one-inch thick computer damage model, the flaw in which is in the computer program, and I can't get you to get me that in advance of the deposition so I can get a computer expert to tell me what the problem is so that I can effectively examine him? And I don't know whether it's broad enough to preclude that or not.

MR. SUSMAN: We didn't want to preclude that. I mean, our intention was not to preclude that. If that was a document prepared by an expert, I think you're entitled to subpoena those.

CHAIRMAN SOULES: Doesn't your Rule permit both reports and depositions on Pages 6 and 7?

MR. SUSMAN: Well, we talk about a kind of report, which is this mandatory disclosure on Page 6.

MR. HERRING: You get the substance of the mental impressions and opinions.

MR. SUSMAN: But on Page 7 we say the Court may not order the creation of an expert's written report. I mean, basically we need to know he's going to testify, his general subject matter is going to be damages, he's going to -- the general substance of his mental impressions, opinion. I think maybe we need to say something there to make sure you do get his computer -- his work product. You should get his work product that he's done anyway, but he should not have to go write a four-page report.

CHAIRMAN SOULES: Well, we shortened discovery -- we used the expert report requirement to shorten discovery, Steve. If we're in a court where we know that

the judge is going to hold the expert to the scope of his report, there -- I take fewer experts than -- and more times than not I don't depose the expert. I don't even take the deposition.

MR. SUSMAN: Listen, my personal belief, Luke, would be I would be happy with a Rule that said you only get an expert's report, no deposition of experts, period. I would be happy with that Rule. But our feeling was that most people would not, and so the notion was not to -- at least to eliminate one or the other.

CHAIRMAN SOULES: Well, why is that a discovery burden to have both available?

MR. KELTNER: Let me tell you what the Discovery Task Force felt. We have two problems with that.

First, Luke, there are two kinds of experts. There's the classical hired gun that you're paying for; then there's the treating physician type that's a fact witness as well. You can't -- there's no hammer I have over that witness to make him give a detailed report

that is going to satisfy you in every circumstance. That's issue one.

Issue two is that what we've been finding is, and I'll tell you, although interestingly it's not made it into the appellate decisions, more and more we see if it ain't in the report you don't get to testify about it, which I don't completely disagree with. But they're extremely expensive. When you're talking about holding down the cost of litigation, the cost of an expert report, by a factor of maybe five times in my experience, is more expensive than his deposition, which is sort of a fascinating situation.

I must admit I originally felt as Steve did, that when the Task Force came up with the idea of doing away with the report and just doing it in general terms, I had problems with that. I eventually came around to their viewpoint as a pragmatic thing.

What we didn't intend to do, and I think Mike Hatchell has come up with something, when it's already prepared or going to be prepared for use at trial you get it, and I think that's important.

MR. HATCHELL: What I heard, Steve, was that you want to eliminate duplication of effort, which I can understand perfectly.

MR. SUSMAN: Yeah. That was the only objective there.

MR. KELTNER: But, Luke, I've got to admit, what you say makes a great deal of sense. The only thing is is that it's an expensive thing and it doesn't work with the majority of experts that are called.

MR. SUSMAN: But wait a second, Luke. You've got a good point. Maybe what we ought to do is give the opposing party the option of either asking the expert to prepare a detailed written report, no deposition; or a deposition. Now, that I would go for. That makes a lot of sense. How does that sound to you all?

HONORABLE F. SCOTT McCOWN: No.

MR. SUSMAN: What's wrong with that?

HONORABLE F. SCOTT McCOWN: Because there's two different classes of experts and the kind of experts that you all

are thinking about at the top end where you practice can prepare a detailed report. But the vast majority of experts in the world, while they could come to a deposition and talk to you orally about what they think and why, sitting down and writing it out is a very difficult task for them and an expensive task, like David said.

And the problem is where are you going to go with your Exclusion of Evidence Rule. A real report that will support trial testimony is a lengthy expensive report, and so that becomes extremely difficult for most experts to do. Lawyers deal in words, but a lot of experts don't, either they don't have the skills or they don't have the time.

CHAIRMAN SOULES: My experience is that that gets sorted out in the process because you can't get an expert report unless they either volunteer it or the other side volunteers it or the Court orders it. And if you -- if it's the sort of expert who is really not suited for a report, you tell the judge that whenever the party moves to get the report.

MR. SUSMAN: Luke, I think maybe the answer is you can work that out. Let's say you're in a case opposite me and I've got an economist. You call me up and you say, you know, "If you will give me a six-page report of your economist or a five-page report of what he's going to say, I will not take his deposition," I probably would say, "Great," because it's going to save me a lot of money to have the guy write the report in Washington D.C. and send it to me which I'll give to you rather than have him come down and sit here for a long period of time. Isn't that something you and I can work out by agreement there? I'm just thinking that maybe that's something that could almost always be worked out by agreement.

CHAIRMAN SOULES: I agree with that, except I need to see the report to know because I don't know what that report is going to say. It may be just a bunch of malarkey and now I've still got to take his deposition maybe. It depends on how the trial judge is towards these reports.

But in terms of cost, if you've got one of

these high-dollar experts who is going to testify as an economist or an engineer or in a construction case, the type of information that gets reduced to a report is going to be fully prepared before the deposition is ever taken so all the preparation for that report except its reduction to writing is done and that cost is incurred anyway. At least it is in my practice, and maybe it's different here than elsewhere.

David.

MR. KELTNER: Luke, here is the problem I have with that. I don't think that's the case, and I don't think it's the case because I would guess that 90 percent of the experts who testify in this case are mixed fact and expert witnesses. In family law cases, the child psychologist; the appraiser; in personal injury cases, the treating physician, and the like. I don't see them doing a whole lot of preparation before depositions, and I don't think they want to do a report, and you can't get them to be specific enough.

Mike mentioned in Exxon/West Texas Gathering the Supreme Court basically said you

say it in the report; you ain't going to get to testify --

MR. HATCHELL: No, no. They said it in -- it's the other way. It was the lower court that said that.

MR. KELTNER: Okay. But it really gets to be problematic, and my situation is I don't disagree with the idea if we have one or the other. But for the mixed fact witness who did not choose to be an expert in this litigation, he or she is just going to testify because they just happened to be there and had to reach some conclusions. The report has always been a difficulty for practitioners and we've got to come to grips with that.

I will admit that for the hired gun expert probably all I want is the report and no doubt about it. But 90 percent of the experts aren't the hired gun. They're somebody you didn't really pick or maybe you did and you don't want to admit it, but that's where I think the problem comes.

CHAIRMAN SOULES: But you can't get that report unless it's volunteered or ordered by the Court, so that somehow gets

sorted out in that process.

MR. KELTNER: Yeah. That's a good point. We do have to address what Hatchell brought up. I think that really is important. If we have the hired gun expert who prepares the computer model and makes some false assumptions within the computer program, that's something that we have to make sure comes out. But on the other, I think we just need to rethink the idea, because I have a whole lot of comfort in Steve Susman's idea of you get one or the other. I just wonder how specific you need to be. We sure are getting hypertechnical in excluding things that aren't in experts' reports who never intended to be experts, and that's what puzzles me.

CHAIRMAN SOULES: I don't see how we're going to improve discovery efficiency and cost by changing the expert practice that we have right now, and there may be so much sentiment the other way that I'm just not seeing it. But we try to go the cheapest route. If we can get a report and it's the type of thing that the report will work, that's what we get and we don't spend time on the

deposition record, but we may not know that until we get the report.

If you exclude -- if you foreclose a deposition after you get a report, I think there's going to be a lot of gamesmanship on the report because they know that whenever they produce this that's the end of it, and their guy can't be deposed, so sometimes we have to do both, but it's seldom.

And on the treating physician, he'll give you his records, he won't give you a report, so you've got to take his deposition anyway because you can't even get a report and the judge probably isn't going to order it.

Anyway, those are my thoughts for whatever their worth, and yours are a lot better, I'm sure. So where do we go with this?

MR. KELTNER: I wouldn't reach that conclusion.

CHAIRMAN SOULES: Steve.

MR. SUSMAN: Before everyone gets out of here, the next meeting is -- we have three meetings of our subcommitte I'm scheduling between now and the next meeting of this Committee, which are April 2nd, April 30th

and May 7th in Austin at 9:00 a.m. in the Dean's Conference Room, and anyone is welcome to attend.

CHAIRMAN SOULES: The next time we meet we're going to meet in the Capitol Building because all the facilities here are spoken for, and I will send you a diagram. It's in the basement, I believe, of the Capitol Building.

MR. PARSLEY: It's in the Capitol Extension, which is that hole in the ground that they built north of the Capitol, and it's on the first floor of the Extension.

CHAIRMAN SOULES: It's on the first floor of the Extension, so that's on this side of the Capitol Building, I think, isn't it?

MR. PARSLEY: There's kind of some kiosks out front in the middle of what used to be the Capitol grounds parking lot. It's down from there.

CHAIRMAN SOULES: It's 12:35 and we're adjourned.

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CERTIFICATION OF THE HEARING OF
SUPREME COURT ADVISORY COMMITTEE

- -

I, WILLIAM F. WOLFE, Certified Shorthand Reporter, State of Texas, hereby certify that I reported the above hearing of the Supreme Court Advisory Committee on March 19, 1994, and the same were thereafter reduced to computer transcription by me.

I further certify that the costs for my services in this matter are 1,086.00.
CHARGED TO: Luther H. Soules III.

Given under my hand and seal of office on this the 4th day of April, 1994.

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Certification No. 4696
Certificate Expires 12/31/94

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